DOCKET

No. 86-1052-CSX
Status: GRANTED

Title: Volkswagenwerk Aktiengesellschaft, Petitioner
v.
Herwig J. Schlunk, Administrator of Estates of Franz J. Schlunk and Sylvia Schlunk, Deceased

Docketed:
December 24, 1986

Court: Appellate Court of Illinois, First District

Counsel for petitioner: Shapiro,Stephen M., Rubin,Herbert

Counsel for respondent: Ring,Jack Samuel

Entry	Date	Note	Proceedings and Orders
1	Dec 24 1986	G	Petition for writ of certiorari filed.
2	Jan 23 1987		Brief of respondent in opposition filed.
3	Jan 23 1987	G	Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as amici curiae filed.
5	Jan 28 1987		DISTRIBUTED. February 20, 1987
4	Jan 29 1987		Lodging received. (11 copies).
6	Feb 5 1987	X	Reply brief of petitioner WWAG filed.
7	Feb 23 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Sep 12 1987		Brief amicus curiae of United States filed.
9	Sep 16 1987		REDISTRIBUTED. October 9, 1987
10	Oct 13 1987		Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as amici curiae GRANTED.
11	Oct 13 1987		Petition GRANTED.
			**********
13	Nov 16 1987		Order extending time to file brief of petitioner on the merits until December 11, 1987.
14	Nov 19 1987		Record filed.
		*	Certified copy of original record received.
15	Dec 3 1987	G	Motion of petitioner to dispense with printing the joint appendix filed.
17	Dec 11 1987		Brief amicus curiae of Germany filed.
19	Dec 11 1987		Brief amicus curiae of Motor Vehicle Mfgrs. filed.
18	Dec 12 1987		Brief of petitioner Volkswagenwerk Aktiengesellschaft filed.
20	Dec 12 1987		Record filed.
		*	Lodging recived. .
16	Dec 14 1987		Motion of petitioner to dispense with printing the joint appendix GRANTED.
21	Dec 23 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Jan 11 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Jan 19 1988		Order extending time to file brief of respondent on the merits until February 1, 1988.
25	Feb 1 1988		Brief amicus curiae of Assn. of Trial Lawyers of America filed.
27	Feb 1 1988		Brief of respondent filed.

No. 86-1052-CSX

Entry	Date	Note	Proceedings and Orders
28	Feb 1 1988		Brief amicus curiae of United States filed.
29	Feb 1 1988		Brief amicus curiae of Illinois Trial Lawyers Assn. filed.
26	Feb 3 1988		Lodging received. (Box).
32	Feb 5 1988		SET FOR ARGUMENT, Monday, March 21, 1988. (2nd Case).
30	Feb 8 1988		CIRCULATED.
33	Feb 26 1988	X	Reply brief of petitioner WWAG filed.
34	Mar 21 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 - 1052

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation, PETITIONER

v.

HERWIG J. SCHLUNK, as Administrator of the Estates
of FRANZ J. SCHLUNK and SYLVIA SCHLUNK, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JAMES K. TOOHEY
DAVID C. BOHRER
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000

Of Counsel:
HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Hague Service Convention, an international convention ratified by the United States and the Federal Republic of Germany, provides that in every case in which there is occasion to transmit judicial documents for service on a German defendant, the plaintiff shall translate those documents into the German language and route them to a Central Authority designated by the German government to effect service of such documents on its nationals. In a decision that conflicts with a substantial number of federal and state court rulings construing the Hague Service Convention, the Illinois Appellate Court has held that the safeguards of this federal treaty do not apply if a state court, applying state law principles, characterizes a subsidiary of the defendant located within the United States as an involuntary "agent" for receipt of judicial documents on behalf of the defendant.

The question presented is as follows:

Whether a state court in which an American plaintiff sues a foreign national of a signatory nation may circumvent the exclusive procedures of the Hague Service Convention by characterizing a subsidiary of the defendant located within the United States as an involuntary "agent" for the purpose of receiving judicial documents.

PARTIES TO THE PROCEEDING

The respondent in this case, Herwig J. Schlunk, brought suit against petitioner Volkswagen Aktiengesellschaft (sued herein as Volkswagenwerk Aktiengesellschaft), a corporation organized under the laws of West Germany with its place of business in that nation, Volkswagen of America, Inc., a wholly-owned subsidiary of Volkswagen Aktiengesellschaft organized under the laws of New Jersey with its place of business in Michigan, and Dennis J. Reed, a resident of Illinois.

PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Subsidiaries and affiliates of Volkswagen Aktiengesellschaft, other than wholly-owned subsidiaries and affiliates, are as follows: (1) Volkswagen do Brasil S.A., and (2) Audi A.G. Volkswagen Aktiengesellschaft also owns shares in a number of non-United States companies, but the shares of these companies are not traded on any exchange.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Volkswagen Aktiengesellschaft respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First District, from which the Supreme Court of Illinois denied leave to appeal.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District (App., *infra*, 1a-20a) is reported at 145 Ill. App. 3d 594. The order of the Supreme Court of Illinois denying leave to appeal (App., *infra*, 21a) is reported at 112 Ill. 2d 595. The order of the Circuit Court (App., *infra*, 24a-26a) is unreported.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on June 17, 1986 (App., *infra*, 1a). On October 2, 1986, the Supreme Court of Illinois denied a timely petition for leave to appeal (*id.* at 21a). The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

TREATY INVOLVED

The Convention On Service Abroad Of Judicial And Extra-Judicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, is reprinted at App., *infra*, 27a-38a.

STATEMENT

The Appellate Court of Illinois held that respondent need not comply with the Convention On Service Abroad Of Judicial And Extra-Judicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163 (hereinafter referred to as the "Hague Service Convention") when serving a summons and complaint on Volkswagen Aktiengesellschaft (hereinafter referred to as "VWAG"), a corporation organized under the laws of the Federal Republic of Germany. In so ruling, the Appellate Court concluded that it was sufficient for respondent to serve those documents on Volkswagen of America, Inc. (hereinafter referred to as "VWoA"), a subsidiary of VWAG organized under the laws of New Jersey. Applying Illinois common law, the Appellate Court characterized VWoA as an involuntary "agent" of VWAG for the purpose of receiving pleadings directed to VWAG, and ruled that this imputed agency dispensed with the need to comply with the requirements for serving judicial documents on foreign corporations prescribed in the Hague Service Convention.

As sustained by the Appellate Court in this case, the method of serving process utilized by respondent conflicts with the Hague Service Convention and the Supremacy Clause of the United States Constitution. The Hague Service Convention prescribes federal law procedures for service of process on German corporations. Numerous other courts, both state and federal, have held that the Hague Service Convention prescribes the exclusive method for serving judicial documents on a foreign corporation

located in a signatory nation, and therefore that attempted service on a foreign corporation through an involuntary "agent" in the United States infringes the terms and purposes of the Convention. Before summarizing the facts of this case and the holdings of the courts below, we briefly describe the relevant features of the Convention.

The Hague Service Convention

The Hague Service Convention is a multi-national treaty, ratified by the United States and 23 other countries, which protects the rights of both plaintiffs and defendants involved in civil litigation with persons in signatory nations by prescribing a system for serving judicial documents that is inexpensive, reliable, and consistent with standards of fundamental fairness. The policy of the Hague Service Convention is stated in its Preamble, which declares that the Convention is designed to ensure that judicial documents served abroad "shall be brought to the notice of the addressee in sufficient time." The Convention also serves the purpose of "simplifying and expediting" service of judicial documents on foreign defendants. App., *infra*, 27a. The Convention states that its procedures are exclusive: "The present Convention *shall* apply in *all* cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Article 1, App., *infra*, 27a (emphasis supplied).

The Convention achieves its objectives by requiring signatory nations to establish a Central Authority for service of judicial documents originating from other signatory nations. Article 2, App., *infra*, 27a-28a. The Central Authority must serve those documents if, but only if, they satisfy the requirements of the Convention. Articles 2-4, App., *infra*, 27a-28a. The Central Authority has the right to require the documents to be "translated into the official language . . . of the State addressed." Article 5, App., *infra*, 29a. And to ensure that recipients receive adequate

time to respond to pleadings forwarded under the Convention, the Convention provides that no default judgment may be entered unless the pleadings were received "in sufficient time to enable the defendant to defend." Article 15, App., *infra*, 32a.

The United States, whose representatives contributed substantially to the drafting of the Convention, ratified it in 1969. 20 U.S.T. 361. When the Federal Republic of Germany ratified the Convention in 1979, it specified that judicial documents must be "written in, or translated into, the German language." App., *infra*, 47a. At the same time, Germany rejected the option, embodied in Article 10 of the Convention, that would allow direct transmission of judicial documents to German nationals in Germany. *Ibid.*

Thus, the Hague Service Convention, as it is in force between the United States and the Federal Republic of Germany, requires that in "all" cases in which pleadings must be transmitted to a German national in West Germany to apprise it of litigation pending against it in an American court, the plaintiff must utilize the Central Authority designated under German law, must translate the pleadings into the German language, and must afford the defendant sufficient time to frame responsive pleadings.

The Present Litigation

The present case arose out of an automobile accident in Cook County, Illinois. Respondent originally filed suit against Dennis J. Reed and VWoA, alleging that Reed had caused the accident by driving negligently and that VWoA had distributed a defective vehicle. C2-25.[1] After filing the complaint, however, respondent decided that his allegations of improper vehicle design should have been asserted against VWAG. Accordingly, respondent filed an amended complaint (C45-86), which added VWAG as

[1] "C" refers to the record before the Appellate Court of Illinois.

a defendant. The amended complaint correctly alleged that VWAG is organized "under the laws of the Federal Republic of Germany," that it has its "place of business" at "Wolfsburg, Federal Republic of Germany," that it is "not authorized to transact business in Illinois," and that it "is a non-resident of Illinois." C74.

Respondent served VWoA through CT Corporation System, VWoA's registered agent for receipt of process in Illinois. VWoA subsequently filed a timely appearance and answer to the complaint. C27-40. Respondent also attempted to serve VWAG through CT Corporation System. C88, 92. However, CT Corporation System advised respondent that it was "not the Statutory Registered Agent in Illinois for Volkswagenwerk Aktiengesellschaft," and that it was "not authorized to take service for one company in care of another." C88.

Despite this unambiguous denial of authority to accept judicial documents, respondent nonetheless caused an "alias summons" to be served upon CT Corporation System, which was addressed as follows (C93-94):

> "Volkswagon Company of America, Inc. [*sic*], . . . as Agent for Volkswagonwork [*sic*] Aktiengesellschaft, a/k/a Volkswagenwerk, AG . . . 208 S. LaSalle Street, Chicago, Illinois 60604."

VWAG thereafter filed a special limited appearance for the purpose of quashing respondent's improper service upon it through CT Corporation System and VWoA.[2] VWAG asserted that it could be served *only* pursuant to the provisions of the Hague Service Convention, notwithstanding any contrary provision of Illinois law, and that respondent had made no attempt to comply with the federal law requirements of the Hague Service Convention in this case. C96, 101-102, 158-169.

[2] VWAG did not dispute the long-arm jurisdiction of the courts of Illinois to adjudicate this case.

VWAG's relationship with VWoA appeared in documents submitted in connection with VWAG's motion to quash service. As the complaint conceded, VWAG is a corporation established under the laws of West Germany with its place of business in that nation, and is not authorized to do business in Illinois. It is controlled by a Board of Supervisors composed of members of the West German Federal government, the State government of Lower Saxony, labor and trade unions, members of industry, and a member of management. C268.

VWoA, a wholly-owned subsidiary of VWAG, is a corporation organized under the laws of New Jersey with its place of business in Michigan. C172, 333. Eight of VWoA's 13 directors also sit on the Board of Management of VWAG. C383-385. However, VWoA has its own capital of $242 million, and has its own subsidiaries, which are capitalized with an additional $40 million. C333. VWoA does not share or have in common with VWAG any officers, employees, bank accounts, lines of credit, or corporate books and records. C173.

The underlying agreements by which VWoA received a franchise from VWAG to use the Volkswagen trade name and trademark are known as "Importer Agreements." The Importer Agreements (C422-461, 230-261) contain an express disclaimer of agency (C234, 392; emphasis supplied):

> "VWoA shall carry on all business arising from this agreement as an independent entrepreneur on its own behalf and for its own account. VWoA is not an agent for VWAG and shall not act or purport to act for the account or on behalf of VWAG."

The Rulings Of The Courts Below

The Circuit Court of Cook County denied VWAG's motion to quash service. The court specifically found that "VWAG has not appointed VWoA as its agent for service of process in common law actions brought against

it in Illinois or in any other state in the United States." App., *infra*, 25a. Nonetheless, the Circuit Court, applying Illinois common law principles, concluded that "VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent." *Ibid.* Accordingly, the court reasoned, service of pleadings could be made on VWAG in Germany through its imputed local "agent" without infringing the Hague Service Convention, which, the court believed, is "applicable only to service of process outside of the United States." *Ibid.*

The Appellate Court of Illinois affirmed. App., *infra*, 1a-20a. The Appellate Court acknowledged that the Hague Service Convention supersedes inconsistent state law by virtue of the Supremacy Clause. *Id.* at 4a. However, the court believed it possible to narrowly construe the Convention and render it inapplicable in any case in which state law would support the characterization of a domestic subsidiary as an "agent" of the foreign parent. In such cases, the court reasoned, the "target for service can be found within the state." *Ibid.* In other words, by the device of labelling VWoA as an involuntary "agent" of VWAG under state law principles, the Appellate Court found it possible to completely bypass the remedial procedures prescribed in the Hague Service Convention.

In reaching its conclusion, the Appellate Court emphasized that the Hague Service Convention permits defendants to accept service "voluntarily" through local agents of their own selection. Article 5, App., *infra*, 28a. It reasoned that this also permits a court to designate an agent for receipt of process as a matter of law and against the wishes of the defendant: "If the Supremacy Clause permits service on agents within the forum state, despite the existence of the Hague Convention (which says nothing about locally appointed agents), it should not matter how that agency relationship came about."

Id. at 8a. Thus, the Appellate Court relied on the right granted defendants under the Convention to receive service on a *voluntary* basis as a device to justify *involuntary* service and to abrogate the other fundamental rights guaranteed by the Convention—the right to receive pleadings translated into the language of the defendant, the right to receive pleadings through the designated Central Authority of the defendant's nation, and the right to receive an adequate amount of time to frame a response.[3]

REASONS FOR GRANTING THE PETITION

I. The Illinois Appellate Court Has Construed The Hague Service Convention In A Manner That Substantially Impairs Its Effectiveness And Conflicts With Numerous Other Decisions.

The decision of the Appellate Court of Illinois frustrates the letter and purpose of the Hague Service Convention, an important international treaty entered into by the United States and its major trading partners. As the Solicitor General has recently reminded the Court, the Convention was intended to be the "exclusive" system for serving judicial documents on foreign defend-

[3] The decision of the Appellate Court, from which the Illinois Supreme Court denied leave to appeal, is a final decision under 28 U.S.C. § 1257. The Illinois courts have finally rejected petitioner's claims under a federal treaty, and further proceedings in the Illinois courts would result in irreparable infringement of petitioner's federal treaty rights. Under Illinois law (Ill. Code Civ. P. § 2-301(c)), VWAG's "taking part in further proceedings" on remand would constitute a "waive[r]" of those rights. Since the federal treaty issue raised by petitioner is unrelated to the merits of this case and is not effectively reviewable following further proceedings on remand, this Court has jurisdiction to grant certiorari. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975); *Shaffer* v. *Heitner*, 433 U.S. 186, 195-196 & n.12 (1977); *American Motorists Ins. Co.* v. *Starnes*, 425 U.S. 637, 639-642 & n.3 (1976); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963).

ants in United States courts.[4] Nonetheless, the court below refused to require respondent to utilize that system when serving his complaint on petitioner, a German corporation.

Instead, the Appellate Court undertook an *ad hoc* factual analysis of the relationship between petitioner and its domestic subsidiary to determine whether, under state law principles, the domestic entity may be characterized as petitioner's involuntary "agent" for the purpose of receiving judicial documents. But it is not within the province of a state court to elevate common law "agency" doctrines above the federal policies embodied in the Convention. See U.S. Const., Art. VI, cl. 2.

The decision below substantially weakens the guarantees of the Hague Service Convention and threatens to cause serious adverse repercussions for our nation's international trade and foreign relations. In light of the confusion in the lower courts concerning the proper interpretation of the Convention, further review is plainly warranted.

A. The Hague Service Convention, ratified by the United States and 23 other sovereign nations, embodies a commitment by the United States to serve judicial documents upon foreign defendants in compliance with its provisions. Yet the Appellate Court of Illinois has deemed the Convention to be completely inapplicable whenever, under state law principles, a domestic entity may be characterized as an "agent" of the foreign defendant for the purpose of receiving process. Decisions such as this, which have rapidly grown in number and produced a serious conflict in judicial interpretations of the Hague Service Convention (see pages 12-16, *infra*),

[4] See Brief for the United States as Amicus Curiae in *Club Mediterranee* v. *Dorin*, No. 83-461, at 7 (noting that "the Hague Service Convention," unlike the Hague Evidence Convention, "expressly provides that it is exclusive").

threaten to eviscerate the Convention and constitute a repudiation of the international obligations of the federal government.

The Illinois Appellate Court's misinterpretation of the Hague Service Convention has immense practical importance. In light of the decision below and similar decisions in other jurisdictions, most foreign manufacturers whose products are sold in the United States can be sued without complying with the Convention. According to one recent census of subsidiary corporations, more than 2,700 foreign companies own subsidiaries in this nation. That figure includes a large percentage of the foreign manufacturers that sell products in the United States. See *Who Owns Whom (North America)* 487-609 (Dun & Bradstreet 1985).[5] Many other foreign firms have local affiliates, whether characterized as partners, joint venturers, partially-owned subsidiaries, or distributors. See *Statistical Abstract of the United States* 804-805 (Department of Commerce 1985) (summarizing the extent of foreign establishment of United States affiliates). Through application of the state-law rationale adopted in this case, these subsidiaries and affiliates could readily be converted into involuntary "agents," thereby overriding the provisions and policies of the Hague Service Convention on the broadest scale. Beyond that, the state court's involuntary "agency" rationale could also be applied to non-corporate foreign nationals such as partnerships and individuals, thereby stripping the Convention of vitality altogether.[6]

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[5] This Court described the growth of foreign-owned subsidiaries in the United States in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185-188 (1982).

[6] The great practical importance of the Illinois court's "agency" rationale is underscored by a review of the cases cited at pages 12-13, *infra*, which demonstrate the readiness of litigants to characterize the secretary of state or commissioner of motor vehicles as a local "agent" who may be served with process to escape compliance with the Hague Service Convention.

The conflicting authority that has developed under the Hague Service Convention fully warrants this Court's attention. "The nation as a whole would be held to answer if a State created difficulties with a foreign power. . . . No State can rewrite our foreign policy to conform to its own domestic policies." *United States* v. *Pink*, 315 U.S. 203, 232-233 (1942). There can be little question that judicial rulings, such as the ruling of the Illinois Appellate Court, create friction in the field of international trade and impair relations with this nation's trading partners. Such parochial rulings—which infringe not only the procedural rights of foreign defendants but also the sovereign rights of foreign nations that have established Central Authorities to regulate service of judicial documents on their citizens—represent the very form of "intrusion upon [the foreign] state's sovereignty" that the Hague Service Convention was designed to avert. See *Restatement of the Foreign Relations Law of the United States*, Ch. 7, Sub. Ch. A, Introductory Note (Tent. Final Draft July 15, 1985).

Indeed, as demonstrated below (see pages 24-25, *infra*), the Appellate Court's involuntary "agency" rationale resurrects one of the specific evils that gave rise to the Hague Service Convention. Prior to the Convention, many nations permitted their citizens to serve a foreign national by delivering the pleadings to a person deemed to be an involuntary "agent" for receipt of process under local law. In ratifying the Convention, signatory nations intended to protect their citizens against this unfair service practice. The method of service upheld by the Appellate Court in this case frustrates that intent and invites retaliation against American defendants in the courts of other signatory nations.

In recognition of the great practical importance of securing a correct and uniform construction of international conventions governing frequently recurring questions of civil procedure affecting the nation's judicial

system, this Court granted certiorari on June 9, 1986 in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695, a case calling for an authoritative interpretation of the Hague Evidence Convention. The Court should, we submit, follow the same course here.

B. The practical effect of the decision of the Illinois Appellate Court, which looks to state law principles to determine whether a foreign defendant located in a signatory nation may be served through an involuntary local "agent," is to leave to each of the 50 states and to thousands of state judges the question whether the Hague Service Convention applies at all in cases in which judicial documents must be transmitted across international boundaries. That reliance on state law has generated directly conflicting rulings depending upon the jurisdiction in which suit is filed. These conflicting precedents defeat the very purpose of the Hague Service Convention, which was adopted by the United States and its trading partners to establish a uniform method of service to overcome the confusion and inconsistency resulting from the application of 50 different bodies of American procedural law as well as of the various procedural laws of other signatory nations. See pages 23-24, *infra*.

The conflict in the lower courts is substantial and growing. Many courts have held that the Hague Service Convention bars service of judicial documents on foreign corporations through attempted service on domestic subsidiaries and other persons or entities labelled as "agents" of the foreign corporation under state law. Indeed, several of these decisions have held that the very defendant involved here—VWAG—may *not* be served through attempted service on its domestic subsidiary, VWoA, or some other fictional local "agent." See *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985) (holding that service on VWoA and on the Rhode Island Secretary of State for ultimate transmittal to VWAG did not

constitute valid service on VWAG); *Hamilton* v. *Volkswagenwerk Aktiengesellschaft*, No. 81-01-L (D.N.H. 1981) (holding that service on VWoA and on the New Hampshire Secretary of State was "invalid as to VWAG" and that the Hague Convention "must control since it is the 'supreme law of the land'"); *Harris* v. *Browning-Ferris Industries Chem. Services, Inc.*, 100 F.R.D. 775, 776-778 (M.D. La. 1984) (holding, in a suit brought against both VWoA and VWAG, that mailed service to the Louisiana Secretary of State for ultimate transmittal to VWAG was insufficient to bind VWAG, and concluding that "[i]f the provisions of state law conflict with the provisions of an international treaty, by virtue of the supremacy clause the provisions of the treaty must prevail"); *Utsey* v. *Volkswagen of North America*, No. 80-1620-9 (D.S.C. 1981) (holding that "plaintiffs were required to serve VWAG pursuant to the terms of the Hague Convention" notwithstanding the "parent-subsidiary relation" between VWAG and VWoA); *Richardson* v. *Volkswagenwerk, A.G.*, 552 F. Supp. 73, 78-79 (W.D. Mo. 1982) (holding that VWoA could not be deemed "VWAG's de facto agent for common law service of process," and that any service on VWAG must be made through the German "central authority" in full compliance with the Hague Service Convention).[7]

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[7] See also *Low* v. *Bayerische Motoren Werke A.G.*, 449 N.Y.S.2d 733, 734-736 (App. Div. 1982) (holding that German manufacturers may not be served through "agents" such as the Secretary of State or domestic subsidiaries because such service would be "in violation of an international treaty," the Hague Service Convention); *Dr. Ing. H.C.F. Porsche A.G.* v. *Superior Court*, 177 Cal. Rptr. 155, 156-159 (Ct. App. 1981) (holding that German manufacturers must be served under the Hague Service Convention, and that service on local "agents" was insufficient); *Mommsen* v. *Toro Co.*, 108 F.R.D. 444, 445-446 (S.D. Iowa 1985) (holding that Japanese manufacturers may not be served through "agents" recognized under local law, such as the Secretary of State, but must instead be served pursuant to the Hague Service Convention).

The recent decision of the Rhode Island Supreme Court in *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985), demonstrates how far the decision below diverges from authoritative constructions of the Hague Service Convention in other jurisdictions. In *Cipolla*, the plaintiff attempted to serve VWAG by serving VWoA and the Rhode Island Secretary of State pursuant to Rhode Island statutes governing service of process on foreign corporations through local agents. The Rhode Island Supreme Court held, however, that the plaintiff could not bypass the exclusive procedures set forth in the Hague Service Convention (*id.* at 131-132):

> "The convention provides that each state is to designate a central authority to receive requests for service of documents. Requests for service, which must conform to a model form annexed to the convention should be sent, along with the documents in question, by the judicial officer or authority of the state in which the documents originate to the designated central authority of the country in which the recipient is located. When it receives a request, the central authority itself serves the documents or arranges service according to its internal laws." * * * *
>
> "The convention also prescribes several alternative methods of service, including service by postal channels directly to the recipient, but allows signatory countries to object to the alternative methods. West Germany has made such an objection and has specified that all documents must be served through the central authority and must be translated into German."

In view of these exclusive procedures, the Rhode Island Supreme Court held in *Cipolla* that "service on VWAG must be perfected according to the terms of the Hague Convention even though Rhode Island's statutes and rules may provide several other methods." The Court concluded that "VWAG's multiple contacts with Rhode Island"

through the business activities of VWoA do not alter the mandatory character of the treaty. 496 A.2d at 132.[8]

Other recent decisions construing the Hague Service Convention have reached diametrically opposite conclusions, permiting service on imputed local "agents" of a foreign corporation. For example, in *Lamb* v. *Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 97 (S.D. Fla. 1985), the court held that service on VWoA, as an involuntary "agent" of VWAG, eliminated any need to comply with the Hague Service Convention. The court acknowledged that if "service of process in the instant case had been attempted directly on VWAG in the Federal Republic of Germany, then the provisions of The Hague Convention would have to be complied with." However, the court believed that funnelling the same pleadings through VWoA sufficed to avoid the Convention entirely: "service of process was entirely accomplished within the United States by serving the agent of the defendant VWAG."

The Supreme Court of Alabama gave the Convention an equally grudging construction in *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 882 (Ala. 1983), which held that the Hague Service Convention could be avoided by characterizing VWoA as the "alter ego of VWAG" as a matter of state law. See also *Zisman* v. *Sieger*, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985) (hold-

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[8] The Illinois Appellate Court stated that *Cipolla* was distinguishable because it did not expressly repudiate the particular state law agency theory adopted in this case. App., *infra*, 7a. In fact, however, *Cipolla* referred explicitly to the plaintiff's service of process on VWoA and the Secretary of State, and held that these vicarious "methods for effectuating . . . service" on VWAG, although sufficient under Rhode Island law, were insufficient under the Hague Service Convention and could not bind VWAG. 496 A.2d at 131-132. The briefs filed by the parties in *Cipolla* further demonstrate that the "agency" theory here at issue was argued in detail before it was rejected. See Brief for VWAG in the Rhode Island Supreme Court, No. 83-201A, at 14-20, 26-36, copies of which have been lodged with the Clerk of this Court.

ing that service on a United States subsidiary of a foreign corporation sufficed to bind the foreign corporation because "its agent is located and served within the United States"); *McHugh* v. *International Components Corp.*, 461 N.Y. Supp. 2d 166, 167-168 (Sup. Ct. 1983) (approving service through a domestic subsidiary corporation without compliance with the Hague Service Convention because "service was made within the United States").

These conflicting authorities are certain to generate substantial litigation burdens in a large number of future cases.[9] Because these cases have arisen in both state and federal courts across the country, and because the conflict in authority is increasing rather than decreasing, there is no reasonable likelihood that the disagreement will be resolved without intervention by this Court. Only this Court can restore uniformity of construction to an important multi-national treaty that the United States and its trading partners adopted to ensure consistent practice throughout the 50 states.

II. The Decision Of The Illinois Appellate Court Conflicts With The Literal Language And The Declared Purposes Of The Hague Service Convention.

The adverse consequences detailed above need not be suffered, because the Appellate Court's decision is plainly

[9] VWAG is subject to numerous suits filed in the United States. As the cases discussed above demonstrate, acceptance of the involuntary "agency" rationale means that VWAG's enjoyment of the procedural protections negotiated by its government will depend upon the common law of the state in which suit is brought as well as the *ad hoc* factual determinations of the individual judge before whom the case is pending. Many other product manufacturers located in foreign countries, which have subsidiaries in the United States, are exposed to similar litigation and therefore face similar uncertainty and inconsistent treatment. In each such case, the conflicting authorities cited above could be invoked by the parties, adding substantially to the cost and protraction of civil litigation. This burden is borne not only by the parties, but also by the judicial system at large.

incorrect. The Appellate Court reasoned that "[u]nder Illinois law, if the target for service can be found within the state there is simply no occasion for service abroad. Since there is no occasion for service abroad in this case," because VWoA could be deemed VWAG's involuntary "agent" for receipt of process by operation of Illinois common law, "the Hague Convention, by its own terms, does not apply." App., *infra*, 4a. This ruling conflicts with the terms and manifest purposes of the Hague Service Convention.

A. The Illinois Appellate Court believed that the phrase "service abroad" in Article 1 of the Convention imposes a significant limitation on the scope of the Convention, carving out an enclave in which the law of the forum state prevails over the uniform rules established by the treaty. However, Article 1 itself contains no such domestic law limitation. It provides that the Convention's requirements apply "in *all* cases, civil and commercial, where there is *occasion to transmit* a judicial or extra-judicial document for service abroad" (emphasis supplied).[10] The plain meaning of Article 1 is that the Convention's requirements apply to all cases such as this one in which it is necessary to transmit pleadings to a foreign corporation located in a signatory nation to apprise it of litigation in which its rights and obligations will be adjudicated.

The fiction of characterizing VWoA as VWAG's "agent" and as the "target for service" under Illinois law cannot obscure the fact that respondent is suing VWAG, a West German corporation located in West Germany, and that the judicial documents must reach VWAG abroad

[10] The court below, in effect, rewrote Article 1 to provide:

"The present Convention shall apply *only in those cases* where there is occasion to transmit a judicial or extra-judicial document abroad and, *under the law of the forum state, service of that document is not deemed to occur prior to its transmittal to the state of destination.*"

so that a responsive pleading may be interposed. Respondent's initial complaint named only VWoA as a defendant. When respondent discovered that the vehicle involved in the accident that gave rise to this litigation was designed and manufactured by VWAG in West Germany, he amended his complaint to name VWAG as a defendant and to assert defective design and manufacture claims against VWAG. Respondent in fact acknowledged that service of the amended complaint on VWoA was not service on VWAG when he forwarded an "alias summons" to VWoA as "agent" for transmittal to VWAG. Thus, VWAG was obviously the "target of the service" at issue in this case and respondent's delivery of the complaint against VWAG to VWoA clearly constituted "an occasion to transmit a judicial . . . document for service abroad."

The substituted service attempted by respondent in this case necessarily involved transmittal of the pleadings to VWAG, the actual defendant. Service on an involuntary "agent" of the defendant can be justified only because it is "reasonably certain that the subsidiary will turn over the process to the defendant parent." *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d at 885 (Torbert, C.J., concurring specially). Indeed, absent that assumption, such "agency" service would violate the Due Process Clause of the Fourteenth Amendment. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[11] VWoA, therefore, was simply the conduit for transmittal of the summons and complaint to a German national, VWAG, in West Germany.

Moreover, the Appellate Court's suggestion that the drafters' use of the phrase "service abroad" in Article 1 was intended to create a domestic law limitation on the

[11] Substituted service on a corporation presupposes "that notice and the papers will be transmitted to the proper corporate officers for the making of its defense." 9 *Fletcher Cyclopedia Corporations* § 4412, at 400 (1985 ed.).

reach of the Convention cannot be squared with other provisions of the Convention. As noted above, the normal method of transmitting judicial documents for "service abroad" under the Convention is through the Central Authority. However, absent objection by the state of destination, the Convention authorizes alternative methods of transmitting judicial documents for service on foreign nationals. For example, Article 10(a) provides that if "the State of Destination does not object, the present convention shall not interfere with . . . the freedom to *send* judicial documents, by postal channels, directly to persons abroad." App., *infra*, 30a (emphasis supplied). Where, as here, a signatory nation has objected to the method of transmission authorized by Article 10(a), a plaintiff must *send* judicial documents through the Central Authority designated by the objecting nation.

Nothing in Article 10 even remotely suggests that a plaintiff may disregard a signatory nation's objection to direct transmission of judicial documents whenever the law of the forum state deems "service" of those documents to have occurred prior to their transmittal to foreign nationals in the objecting country. Accordingly, whatever the "service" rules of the forum state may be, the Convention clearly applies to cases such as this one in which pleadings must be sent to a defendant in a signatory nation to apprise it of litigation pending in another signatory nation.[12]

[12] Contrary to the Illinois Appellate Court's suggestion (App., *infra*, 5a), this case does not involve the question whether the Convention applies when a foreign national is personally served with process while physically present in the United States and therefore there is no need to transmit the pleadings to a person located in another signatory nation. As noted above, the "agency" service attempted by respondent rests on the premise that the involuntary "agent" will act as a conduit for transmittal of the pleadings to the actual defendant abroad. In this case, therefore, the method of service used by respondent necessarily involved the transmittal of judicial documents to VWAG in West Germany.

B. The Appellate Court's restrictive construction of the Hague Service Convention—and its elevation of state policy over federal policy—disregards this Court's pronouncements regarding the proper interpretation of federal treaties and ignores the fundamental principle of federal supremacy in matters of international relations. As this Court repeatedly has held, international treaties "are construed more liberally than private agreements." *Air France* v. *Saks*, 470 U.S. 392, 105 S. Ct. 1338, 1341 (1985). Thus, if a "treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933); see also *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928), ruling that a "narrow and restricted" construction of a federal treaty should ordinarily be rejected in favor of a construction "enlarging" the rights conferred thereby. These principles require rejection of the notion that the phrase "service abroad" was intended to deny a foreign corporation sued in an American court the protection of the Hague Service Convention. See Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 Int'l & Comp. L.Q. 528, 539 (1965), explaining that the Hague Service Convention must be construed "in the liberal spirit in which it is intended," with a view to mitigating the "hardship and injustice" that it sought to redress.[13]

In applying Illinois law to resolve the service issue raised herein, the Appellate Court ignored the cardinal principle that "state law must yield when it is incon-

[13] See also brief for the United States as Amicus Curiae in *Anschutz & Co., GmbH.* v. *Mississippi River Bridge Authority*, No. 85-98, at 17 n.21, rejecting the argument—substantially identical to the reasoning of the Appellate Court in this case—that the protections of the Hague Evidence Convention apply only in instances where evidence is ordered to be taken from a foreign defendant abroad as opposed to in the United States.

sistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink*, 315 U.S. at 230-231. See also *Zschernig* v. *Miller*, 389 U.S. 429, 440-441 (1968). The primacy of federal law in this field reflects the binding obligations of the United States under principles of international law. As explained by the reporters of the *Restatement of the Foreign Relations Law of the United States*, § 321 (Tent. Final Draft July 15, 1985): "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith." The fundamental doctrine of *pacta sunt servanda* "is perhaps the most important principle of international law." It requires that "international obligations survive any restrictions in domestic law." *Id.* at Comment a.

C. The Appellate Court's construction of the Hague Service Convention, which would permit a plaintiff to avoid the Convention's safeguards whenever, under the law of the forum state, a court may deem "service" to have occurred prior to actual transmittal of the pleadings to a foreign defendant, frustrates the most fundamental purposes of the Convention and defeats the legitimate expectations of signatory nations.

As explained by the former Director of the Office of Foreign Litigation of the Department of Justice, the drafters of the Hague Service Convention intended its safeguards to be "obligatory." See Vol. 1, B. Ristau, *International Judicial Assistance (Civil and Commercial)* 131 (1984):

> "[T]he Convention machinery is obligatory, except in instances where the state where service is to be made permits other methods of service of foreign documents. Where a contracting state formally objects to any manner of service of foreign documents in its territory other than under the Convention, the conventional route becomes the exclusive method of service in that state. Thus, in the Federal Republic [of Germany], service under the Convention is the ex-

clusive method, and mail service * * * is no longer permissible as a matter of United States law."

The negotiation history of the Hague Service Convention confirms its "obligatory" character. See III *Conférence De La Haye, Actes Et Documents, De La Dixième Session, Notification*, 366-367 (1964) ("Caractére Obligatoire De La Convention").[14] The draftsmen noted that the final draft of the Convention had been profoundly altered ("profondément altéré la rédaction") to make clear its mandatory effect. They stressed that doubts about coverage must accordingly be resolved in favor of inclusion ("L'interprétation authentique de la Commission telle qu'elle ressort des débats, est dans le sens de l'application de la Convention"). The English delegate added that the Convention must be applied "in the liberal spirit in which it is intended" to redress the "hardship and injustice which it seeks to relieve." *Ibid.*

The decision of the Appellate Court in this case nullifies these objectives. By the fiction of forcibly designating VWoA as an involuntary "agent" of VWAG for receipt of judicial documents under Illinois law, the Appellate Court has stripped away the most basic protections conferred by the mandatory terms of the Convention. VWAG has been denied the right to receive pleadings translated into its own language, even though it alone must make decisions about its defense in pending litigation; VWAG has been deprived of its fundamental right to an adequate amount of time to enter a plea; and the West German government has been denied its sovereign right to serve the process at issue, even though one of its own domestic corporations is exposed to liability in an American court and even though Germany has objected to service of pleadings by informal methods.[15]

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[14] The negotiation history of the Convention is written in the French language.

[15] The Convention was intended to respect the rights of signatory nations by "insuring that such service would be made under controlled procedures that would maintain the judicial sovereignty of each nation." Bishop, *The Evolving Judicial Construction of the Hague Evidence and Service Conventions*, Newsletter, International Law Section, State Bar of Texas, 2, 4 (April 1985).

D. The Appellate Court's erroneous construction of the Hague Service Convention also frustrates the reasonable expectation of signatory nations that the uniform procedures prescribed in the Convention will protect foreign defendants against inconsistent service rules in 50 different American states. See *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir.), cert. denied, 454 U.S. 1085 (1981):

> "The nature of the judicial system of the United States, which includes not only the federal courts but also the many state systems with their differing procedural requirements, was one of the primary justifications for entering into a treaty that would provide a uniform, valid method of effecting service. * * * 'With . . . [50] separate procedural jurisdictions in the United States * * * a unitary approach is the only solution.'"

The decision below defeats this goal of uniformity by making the coverage of the Convention turn upon local law and an *ad hoc* evaluation of the relationship between parent and subsidiary corporations.

Such *ad hoc* factual evaluations under local law necessarily interject serious confusion into the uniform system for transmission of judicial documents established by the Hague Service Convention. They generate the kind of debilitating uncertainty that this Court criticized in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185-189 & n.11 (1982), when it upheld the separate status of "foreign corporations" and their wholly-owned American "subsidiaries" under an international convention. The Court refused to endorse a nebulous "control test" that would needlessly convert "a simple [legal] matter" into a recurring "subject of dispute." *Ibid.*

The Illinois Appellate Court nonetheless expressed doubt about the importance of assuring a "uniform method of service" under the Hague Service Convention. The court suggested that foreign nationals should not be afforded "greater protection than United States citizens who are also subject to the laws of any state with which they have sufficient contacts." App., *infra*, 8a. That, however, is merely a quarrel with the federal policy embodied in the Convention. Special service rules for foreign defendants, which recognize differences in language and unique difficulties in obtaining effective representation across international boundaries, unquestionably constitute a reasonable and proper exercise of the federal government's exclusive powers in the field of foreign relations, and state courts are bound to accept that determination.[16]

E. The Appellate Court's decision threatens to recreate the very evils that the Convention sought to eliminate and also exposes the United States to retaliation by other signatory nations. Prior to ratification of the Hague Convention, many nations commonly utilized a system of service—similar to the involuntary "agency" service approved in this case—known as *notification au parquet*. Under that system, plaintiffs in nations such as France, Belgium, Greece, the Netherlands, and the United Arab Republic routinely commenced litigation against Ameri-

[16] The Appellate Court's reasoning also ignores the fact that the Hague Service Convention confers protection equally upon domestic and foreign litigants, and upon plaintiffs and defendants. The Convention provides a simple, economical and reliable method of transmitting judicial documents across international boundaries, which is beneficial to *all* litigants. Prior to the Convention, service in foreign nations was complicated, expensive, and seldom could be accomplished without engaging the assistance of foreign lawyers. By complying with the Convention, not only does a litigant obtain service that is not objectionable to the defendant, but he also obtains service that is not objectionable to the defendant's nation. This means that any judgment that the plaintiff ultimately obtains will be enforceable.

can defendants simply by serving process on local officials who were deemed, as a matter of law, to be agents of the defendant.

The American delegates who participated in the drafting of the Hague Service Convention intended to protect American citizens against such unfair practices by requiring all signatory nations to adhere to the uniform system of notification embodied in the Convention.[17] The United States fully recognized that preservation of the safeguards of the Hague Service Convention for foreign defendants was essential to assure equivalent protection for American citizens haled into the courts of other nations. See Senate Executive Report No. 6, 90th Cong., 1st Sess., Appendix 6-7 (1967), observing that the Hague Service Convention "provides a high degree of assurance that if an American citizen in the United States is sued in the courts of a state party to this treaty, he will be notified of the suit in sufficient time to enable him to defend the action. *The obverse is also true. If a person outside the United States is sued in one of our courts, the necessary steps must be taken to insure that he will be notified of the action and afforded an opportunity to defend*" (emphasis supplied).

The Appellate Court's restrictive construction of the treaty—which endorses involuntary "agency" service and effectively resurrects the discredited practice of *notification au parquet*—constitutes a provocative rejection of the treaty obligations of the federal government and raises the risk of retaliation by other signatory nations.

[17] *See* Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 Cornell Int'l L.J. 125, 130 (1969) ("The United States properly sought to stop this practice"); Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 653 (1965).

F. The procedures established by the Hague Service Convention are so simple and impose such a minimal burden upon litigants that it is difficult to understand why any court would fail to enforce them or why any plaintiff would object. All that the plaintiff is required to do is to translate the summons and complaint and mail the English and German versions together with the service form to the Central Authority.

By contrast, leaving a complaint against a foreign corporation with an involuntary "agent," without any translation, imposes serious burdens on such a defendant. See *Report of the United States Delegation on the Work of the Special Commission on the Operation of the Hague Convention*, 17 Int'l Legal Materials 312, 317 (1978), observing that untranslated pleadings "plainly fail to give to the recipient notice which is reasonably calculated to impart knowledge of an impending action." The Federal Republic of Germany has expressly declared that any process addressed to its nationals must be translated, and yet the Appellate Court ignored that declaration. This is certain to erect unnecessary barriers to the enforcement of judgments.[18]

Beyond this, there is a substantial risk that the individual employee of a domestic subsidiary who receives judicial documents and who owes no direct duty to the parent company may misread them and assume that they are intended only for the subsidiary or may fail to act promptly in transmitting the pleadings to the defendant parent company. In such cases, pleadings will necessarily be passed through the hands of unauthorized entities and will arrive in the foreign country without translation days or weeks after the purported date of

[18] See *Julen* v. *Larsen*, 101 Cal. Rptr. 796 (Ct. App. 1972), holding that a judgment is unenforceable when the defendant receives process that is not translated into his own language.

service.[19] The foreign company, in need of more time than a local defendant, will then be required to translate the papers before it can begin the complex process of retaining local counsel thousands of miles away, investigating the case, and preparing its procedural and substantive responses to the complaint. Even then, its right to a reasonable period to plead will have been greatly infringed, with a severely adverse effect on its ability to avoid a default and assert all appropriate procedural rights.[20]

In sum, acceptance of the Illinois Appellate Court's interpretation of the Hague Service Convention invites unnecessary litigation in every case over the threshold question whether the particular parent-subsidiary relationship is such that the subsidiary may be deemed the parent's involuntary "agent" for receipt of process in the United States. And it opens the door to unnecessary disputes over the enforceability of judgments rendered by United States courts. Failure to abide by the simple procedures prescribed in the Hague Service Convention, as countenanced by the Illinois Appellate Court, is certain to increase the burden and expense of civil litigation —with no countervailing public benefit.

[19] In the present case, for example, respondent delivered an ambiguously worded "alias summons" and a complaint, written in English, to CT Corporation System in Illinois. Despite CT Corporation System's denial of authority to accept process, respondent insisted that the pleadings be forwarded to VWoA in Michigan. From Michigan, the pleadings were required to be transmitted abroad for service in untranslated form on VWAG in Germany. See pages 5-6, *supra*. It is difficult to conceive of a method of service more antagonistic to the letter and purpose of the Hague Service Convention.

[20] One such right, which is forever lost after 30 days, is the right to remove a case to federal court based on diversity of citizenship. See 28 U.S.C. § 1446(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES K. TOOHEY
DAVID C. BOHRER
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000

Of Counsel:
HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

DECEMBER 1986

APPENDICES

APPENDIX A

OPINION OF THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

No. 85-3169

HERWIG J. SCHLUNK, as Administrator of the Estate of FRANZ J. SCHLUNK, Deceased and, HERWIG J. SCHLUNK, as Administrator of the Estate of SYLVIA SCHLUNK, Deceased,

Plaintiff-Appellee,

—vs—

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a foreign corporation,

Defendant-Appellant,

and

DENNIS J. REED and VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Defendants.

Second Division, June 17, 1986

Appeal from the Circuit Court of Cook County

Honorable Myron T. Gomberg, Judge Presiding

JUSTICE SCARIANO delivered the opinion of the court:

Defendant Volkswagenwerk Aktiengesellschaft (hereinafter VWAG), a West German corporation, appeals, with certification of the circuit court under Supreme Court

Rule 308(a) (Ill. Rev. Stat. 1985, ch. 110A, par. 308 (a)), from the denial of its motion to quash service, which was had in Illinois upon its wholly owned subsidiary, Volkswagen of America (VWoA), a New Jersey corporation. We affirm.

On June 4, 1984, plaintiff, Herwig Schlunk, filed suit against VWoA and Dennis Reed, stemming from the death of his parents in a head-on collision that occurred on December 17, 1983, in Cook County, Illinois. Reed was served by a special process server and an order of default was later entered against him. VWoA was served through its registered agent for service of process in Illinois, C.T. Corporation System, and has filed a timely appearance and answer to the complaint.

On October 16, 1984, plaintiff obtained leave to file his first amended complaint, in which he alleged that design defects in the decedents' 1978 VW Rabbit rendered it uncrashworthy and joined VWAG as a defendant. The car was designed and manufactured in West Germany by VWAG and shipped to VWoA for sale in the United States. The judge then ordered that a summons issue against VWAG. Plaintiff attempted to effect service upon VWAG through C.T. Corporation System, but the latter refused to accept it. On November 19, 1984, an alias summons was issued to C.T. Corporation System, whereby plaintiff attempted to serve VWoA "as Agent for" VWAG.

VWAG filed a special and limited appearance on December 18, 1984, for the purpose of quashing service of process. In support of its motion to quash, VWAG submitted an affidavit from Robert Cameron, manager, product liason, of VWoA, which asserted that VWoA is a separate and independent corporation that operates as an agent of VWAG only for the purpose of receiving notices under the National Traffic and Motor Vehicle Safety Act (15 U.S.C.A. § 1399(e) (West 1982)). In

response to plaintiff's discovery requests, VWAG and VWoA produced documents reflecting, in part, the relationship between the two companies. In addition both submitted answers to interrogatories.

After a hearing, the circuit court, in a written opinion, denied the motion to quash. The court found:

> "1. VWoA is a New Jersey corporation with its principal place of business in Michigan and registered to do business in Illinois * * *.
>
> 2. VWAG has not appointed VWoA as its agent for service of process in common law actions brought against it in Illinois or any other state * * *.
>
> 3. VWoA is a wholly-owned subsidiary of VWAG, a majority of the members of the board of directors of VWoA are members of the board of management of VWAG, and VWoA is the exclusive importer and distributor of VWAG products sold in the United States pursuant to a manufacturer-importer agreement entered into between VWAG and VWoA."

Based on the above findings the judge concluded:

> "VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent."

The court concluded that plaintiff's service of process was effective under the Supreme Court Rules and Illinois Code, and was not in conflict with "The Convention On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (Hague Convention), which, the court ruled, applied only to service of process outside the United States. Upon the application of VWAG, the court certified two questions of law to this court pursuant to Supreme Court Rule 308(a): (1) whether the service in this case violated the Hague Con-

vention, and (2) whether VWoA and VWAG are so closely related that VWoA is VWAG's agent for service of process. This court granted VWAG's petition for leave to appeal on November 26, 1985.

VWAG first argues that service on VWoA was ineffective as to it because the Hague Convention provides the exclusive method of service on residents of signatory nations. West Germany became subject to the treaty in 1979 (79 *Department of State Bulletin* 71 (July 1979), the United States in 1969 (20 U.S.T. 361, T.I.A.S. 6638). VWAG correctly points out that, under the Supremacy Clause, this court is bound by treaties of the United States, if applicable, even in the face of contrary state laws. (U.S. Const., art. VI, cl. 2.) However, nothing done in this case pursuant to state law violated the Hague Convention. Article I of the convention provides in relevant part: "The present Convention shall apply in all cases, in civil or commercial matters, *where there is occasion* to transmit a judicial or extra-judicial document *for service abroad.*" (Hague Convention, *opened for signature* November 15, 1965, 20 U.S.T. 361-73, T.I.A.S. 6638, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C.A. Fed. R. Civ. P., Rule 4, 92-107 (West Supp. 1986), *and* VII *Martindale & Hubbell Law Directory*, Pt. VII, Selected International Conventions, 1-8 (1986).) (Emphasis added.)

VWAG apparently has difficulty with the phrase "service abroad," and implies that it is ambiguous. We do not find it so. Under Illinois law, if the target for service can be found within the state there is simply no occasion for service abroad. Since there is no occasion for service abroad in this case, the Hague Convention, by its own terms, does not apply. (*See* Report on the Senate Committee on Foreign Relations on the Convention on the Service Abroad of Judicial and Extrajudicial Documents, S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 9 (Apr. 12, 1967), statement of Joe C. Barrett, "this convention does not invade the domain of state law in the United States," (*as quoted in De James v. Magnificence Carriers, Inc.* (3d Cir. 1981), 654 F.2d 280, 289 n.5, *cert. denied*, 454 U.S. 1085, 70 L. Ed. 2d 620, 102 S. Ct. 642).)

VWAG asserts that regardless of whether VWoA was its agent for service of process, service must be had according to the procedures set out in the convention. VWAG seems to suggest that, under the convention, one cannot serve West German residents pursuant to Illinois law even when they are in Illinois. VWAG contends, in essence, that the convention is a shield protecting foreign nationals from Illinois legal process while they are in the state. This simply does not survive scrutiny. Even if the intended recipient is standing right next to him, a process server, according to VWAG, would have to send a summons off to West Germany. VWAG has cited no cases explicitly holding that the treaty was intended to work such a drastic interference with orderly state procedure. On the other hand, there are numerous cases rejecting such an argument. For example, in *Lamb v. Volkswagenwerk Aktiengesellschaft* (S.D. Fla. 1985), 104 F.R.D. 95, the court stated:

> "The purpose of the Hague Convention is to simplify the procedures for serving judicial documents abroad to ensure that the party to be served in a foreign country will receive notice in timely fashion. There is nowhere among the provisions of the Hague Convention any indication that it is to control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin. * * * If the service of process in the instant case had been attempted directly on VWAG in the Federal Republic of Germany, then the provisions of the Hague Convention would have to be complied with. In this case, however, service of process was entirely accomplished within the United States by serving the

> agent of the Defendant VWAG; the provisions of the Hague Convention are simply inapplicable." (104 F.R.D. 95, 97.)

(*See also Zisman v. Sieger* (N.D. Ill. 1985), 106 F.R.D. 194, 199-200; *McHugh v. International Components Corp.* (N.Y. Sup. Ct. 1983), 118 Misc. 2d 489, 491, 461 N.Y.S.2d 166, 167.) Indeed, Article 10 of the convention itself says:

> "Provided the State of destination does not object, the present Convention shall not interfere with—
>
> • • •
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination." (Hague Convention, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C.A. Fed. R. Civ. P., Rule 4, 92-107 (West Supp. 1986), *and* VII *Martindale & Hubbell Law Directory*, Pt. VII, Selected International Conventions, 1-8 (1986).)

If VWoA, which is located in this country, is an agent of VWAG here, then the United States is the "State of destination" under the treaty, and the treaty allows plaintiff to effect service using American procedure.

VWAG cites *Low v. Bayerische Motoren Werke, A.G.* (N.Y. App. Div. 1982), 88 A.D.2d 504, 449 N.Y.S.2d 733, and argues that the court held that mailing process to West Germany and serving it upon the wholly owned subsidiary of the German defendant in New York *both* violated the Hague Convention. In fact, the court held that the mailing violated the Hague Convention, and that the record did not support a finding that the wholly owned subsidiary was, *as a matter of New York law*, an agent for service of process of the West German defendant. (88 A.D. 2d 504, 505-06, 449 N.Y.S.2d 733, 735.) Similarly, in *Cipolla v. Picard Porsche Audi, Inc.* (1985), —— R.I. ——, 496 A.2d 130, the plaintiff was allegedly injured when the accelerator stuck on her VW Rabbit. She originally brought suit against the car dealer and VWoA, but was allowed to file an amended complaint to include VWAG as an additional defendant. She then attempted to effect service on VWAG by delivering a copy of the summons and the amended complaint to the Rhode Island Secretary of State. Subsequently, plaintiff's counsel sent a certified letter to VWoA and enclosed a copy of the summons and the amended complaint. The court held that service on VWAG had to be perfected according to the terms of the Hague Convention, although Rhode Island's statutes and rules otherwise provided several alternative methods for service of process. The court added:

> "[Plaintiff's] appellate counsel has cited a plethora of cases to buttress her contention that VWAG's multiple contacts with Rhode Island make it subject to suit without any infringement on VWAG's due-process rights. Some of those cases predate the effective date of the Hague Convention, and others, for reasons not readily apparent, make no mention whatsoever of the 1965 treaty." (—— R.I. ——, ——, 496 A.2d 130, 132.)

We do not read this case as holding that the Hague Convention precluded the plaintiff from serving VWoA as an agent of VWAG. There is no indication that mailing the amended complaint to VWoA was an attempt to serve VWoA as agent for VWAG, or to do anything more than simply notify the American company, which was itself a defendant, of the new pleading. The Rhode Island Supreme Court did not discuss agency theory.

Finally, VWAG argues in its reply brief that the purpose of the Hague Convention is to achieve a uniform

method of service, because it is unfair to subject residents of other nations to the patchwork of alternative methods found in each of the fifty states. It is unclear why foreign nationals should be allowed greater protection than United States citizens who are also subject to the laws of any state with which they have sufficient contacts. In any event, VWAG has conceded away this preemption argument by acknowledging that domiciliaries of foreign states can waive the protection of the Hague Convention by appointing an agent for service of process in the United States. If the Supremacy Clause permits service on agents within the forum state, despite the existence of the Hague Convention (which says nothing about locally appointed agents), it should not matter how that agency relationship came about.

Plaintiff agrees that if service on VWAG as agent of VWoA was improper, then the motion to quash should have been granted, because no attempt was made to serve VWAG in West Germany, under the Hague Convention or otherwise. The main issue in this case, then, is whether serving VWoA as agent for VWAG was good service.

VWAG does not argue that it lacks sufficient minimum contacts with the state for the exercise of jurisdiction consistent with due process. (*See Burger King Corp. v. Rudzewicz* (1985) —— U.S. —— ,——, 85 L. Ed. 2d 528, 540-50, 105 S. Ct. 2174, 2181-90; *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 315-22, 90 L.Ed. 95, 101-06, 66 S.Ct. 154, 158-61.) The Illinois Supreme Court has held that jurisdiction under the Illinois long-arm statute (Ill. Rev. Stat. 1985, ch. 110, par. 2-209), is not coextensive with the due process clause of the U.S. Constitution, but must be satisfied independently. (*Green v. Advance Ross Electronics Corp.* (1981), 86 Ill. 2d 431, 436, 427 N.E.2d 1203, 1206.) One basis for the exercise of long-arm jurisdiction is the "transaction of any business within this State." (Ill. Rev. Stat. 1985, ch. 110, par. 2-209 (1).) However, to assert jurisdiction

under this provision, the claim must be related to the act giving rise to jurisdiction. (*People v. Parsons Co.* (1984), 122 Ill. App. 3d 590, 597, 461 N.E.2d 658, 664.) (*See also Cook Associates, Inc. v. Lexington United Corp.* (1981), 87 Ill. 2d 190, 198-99, 429 N.E.2d 847, 850-51.) Plaintiff did not allege that the VW Rabbit involved in the collision in this case was purchased in Illinois, and apparently does not rely on the "transaction of business" as the basis for jurisdiction.

Apart from the long-arm statute, jurisdiction may be acquired if the nonresident corporation is "doing business" in the state. (*Cook Associates, Inc. v. Lexington United Corp.* (1981), 87 Ill. 2d 190, 199, 429 N.E.2d 847, 851.) If a foreign, unlicensed corporation is found to be doing business in Illinois it is amenable to the jurisdiction of our courts for causes of action not arising from its transaction of business here. (87 Ill. 2d 190, 200, 429 N.E.2d 847, 852.) There is no precise test for what constitutes "doing business" within the state. However, the "doing business" standard is not equated with the full reach of due process, because to do so would render the long-arm statute meaningless. (87 Ill. 2d 190, 201, 429 N.E.2d 847, 852.) Justice Cardozo, while serving on the New York Court of Appeals, said that "doing business" is a corporation's operating within the state "not occasionally or casually, but with a fair measure of permanence and continuity." (*Tauza v. Susquehanna Coal Co.* (1917), 220 N.Y.2d 259, 267, 115 N.E. 915, 917) (quoted with approval, 87 Ill. 2d 190, 203, 429 N.E.2d 847, 853).)

VWAG does not contest the legal power of the Illinois courts to consider the claims against it, once process is served in a manner VWAG deems proper. There are two prerequisites for an Illinois court to exercise personal jurisdiction over a defendant. It is necessary (1) that the defendant has conducted sufficient activity within the state to have submitted to the jurisdiction of our courts

and (2) that the defendant has been served with process in accordance with the formal requirements of Illinois law. "Doing business" is primarily a test of submitting to Illinois jurisdiction in the first sense. Although the two aspects of personal jurisdiction are distinct, many previous Illinois decisions on the validity of serving a parent corporation through its subsidiary have focused on whether the parent was "doing business" in this state. The answer to this question usually depends upon the relationship between parent and subsidiary. For example, plaintiff places great reliance on *Maunder v. DeHavilland Aircraft of Canada* (1984), 102 Ill. 2d 342, 466 N.E.2d 217, *cert. denied*, —— U.S. ——, 83 L. Ed. 2d 401, 105 S.Ct. 511. In that case, two plaintiffs brought suit in Illinois against the Canadian manufacturer of an airplane that had crashed in Zambia. The manufacturer was DeHavilland Aircraft of Canada, Ltd. (hereinafter, Ltd.), of Downsview, Ontario. Its wholly owned subsidiary, DeHavilland Canada, Inc. (Inc.), was a Delaware corporation with its principal place of business in Rosemont, Illinois. Ltd. was not licensed to do business in Illinois and had not appointed an agent for service of process. Plaintiffs served Ltd. by leaving copies of the complaint and summons with an employee of Inc. in its Rosemont office. Our supreme court concluded that Ltd. was doing business in Illinois through Inc. The court then added:

> "Ltd.'s contention that service of process on Inc. was not effective is without merit. We believe that Inc. was an agent of Ltd. for service of process, and the Ltd. was fully apprised of the pendency of the suit by the delivery of a copy of the complaints and summons at Inc.'s office in Rosemont. *Davis v. Dresback* (1876), 81 Ill. 393.
>
> * * *
>
> Since we have determined that Ltd. was doing business in Illinois, we need not address the alternative

> theory of whether Inc. was the *alter ego* of Ltd." 102 Ill. 2d 342, 353-54, 466 N.E.2d 217, 223.

Inc. was established and wholly owned by Ltd. Its sole business was the sale of aircraft parts for Ltd., and Inc.'s own manual stated, "The function of this Company is to provide Product Support to the American users of the Parent Company's products." (102 Ill. 2d 342, 347, 466 N.E.2d 217, 219.) However, Inc., also purchased and distributed standard parts from other suppliers too. ((1983), 112 Ill. App. 3d 879, 883, 445 N.E.2d 1303, 1306, *aff'd* (1984), 102 Ill. 2d 342, 466 N.E.2d 217.) An average of eight phone calls per day were made from Inc. to the parent's office in Ontario. Ltd. paid the salaries of Inc.'s directors and guaranteed Inc.'s lease in Rosemont. Ltd. includes Inc.'s address in its own advertising. The court concluded:

> "If Ltd. cannot be sued in Illinois, it follows that Ltd. cannot be sued anywhere in the United States under the theory of "doing business," since Inc. is the only subsidiary of Ltd. in the United States. We believe that a corporation that has established a supply depot in Illinois to support an enterprise that has sold 885 airplanes in the United States and logged millions of passenger miles should be subject to the jurisdiction of the Illinois courts." 102 Ill. 2d 342, 354, 466 N.E.2d 217, 223.

Plaintiff similarly argues that VWAG was doing business in Illinois by virtue of its relationship with VWoA. In response to this argument VWAG points out that no VWoA officers or employees are paid by VWAG, and that VWAG and VWoA have no employees in common. VWoA maintains separate books and records and carries on business in its own name and for its own account. VWAG does not guarantee any loans of VWoA, and all commercial transactions between the two are set out in legally enforceable contracts. VWAG contends that VWoA is more than a mere sales outlet in that it manu-

factures its own lines of products, imported Porsches in the past as well as VWAG's products, and has a work force in excess of 6,000 employees.

For thirty years, VWAG and VWoA operated pursuant to a written importer agreement. The importer agreement provides: "VWoA is not an agent or representative of VWAG and shall not act or purport to act for the account of or on behalf of VWAG." However, written disclaimers of an agency relationship are not controlling. (*See Slates v. International House of Pancakes, Inc.* (1980), 90 Ill. App. 3d 716, 726, 413 N.E.2d 457, 464-65.) Based in part on the 1974 version of the importer agreement, at least three courts have found VWAG's control over VWoA to be so pervasive as to render VWoA the agent for service of process upon VWAG. (*Roorda v. Volkswagenwerk A.G.* (D. S.C. 1979), 481 F. Supp. 868, 870-80; *Lamb v. Volkswagenwerk Aktiengesellschaft* (S.D. Fla. 1985), 104 F.R.D. 95, 97-101; *Ex parte: Volkswagenwerk Aktiengesellschaft* (Ala. 1983), 443 So. 2d 880, 882-85.) There are also cases holding to the contrary. (*See Volkswagenwerk Aktiengesellschaft v. McCurdy* (Fla. Dist. Ct. App. 1976), 340 So.2d 544). Typical of the contrary cases is *Richardson v. Volkswagenwerk A.G.* (W.D. Mo. 1982), 552 F. Supp. 73, in which the court said:

> "Defendant VWAG has submitted the affidavit of Robert Cameron showing that VWAG did not exercise such a degree of control over VWOA to make VWOA a department of VWAG or to make the activities of VWOA the activities of VWAG. Plaintiffs, on the other hand, have not submited evidence showing facts to the contrary, either at trial or by affidavit, and therefore have not met their burden. *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182 (7th Cir. 1969)." (552 F. Supp. 73, 79.)

(*See also Ex parte: Volkswagenwerk Aktiengesellschaft* (Ala. 1983), 443 So. 2d 880, 884-85.)

VWAG revised the importer agreement in August 1983 in an attempt to vest more discretion in VWoA. The 1983 importer agreement is nontransferable and appoints VWoA to market and distribute VWAG products in the United States. VWAG determines which of its products will be distributed by VWoA. VWAG also determines the method of ordering. Orders are always binding on VWoA unless rejected by VWAG within 4 weeks. VWoA is not entitled to any claims against VWAG stemming from rejection of its orders. VWoA must pay any price increase established by VWAG, even as to previously placed orders. VWAG has no liability to VWoA for early, late or nondelivery of its products if such failure or delay is due to circumstances beyond VWAG's control.

Under the agreement, VWoA is required to consult with VWAG in establishing dealerships and setting its sales objectives. VWAG sets standards for used car sales and for maintaining stock and stock levels. Each dealership maintained by VWoA must conform with VWAG's "Indentification Program," and it must sell its products and services under designations specified by VWAG. VWoA must obtain approval of VWAG before allowing any dealer to use the Volkswagen name or trademark. VWoA is obligated to promote the image of VWAG, protect VWAG's service and trademarks—even to the extent of prosecuting suits in VWAG's name, and to supply products and services under designations specified by VWAG.

VWoA must service all Volkswagen products brought to it, regardless of whether they were originally sold in VWoA's territory, and VWAG has complete discretion in determining the warranty terms VWoA offers to its customers. VWoA is barred from making any modification of VWAG's products.

VWAG provides free marketing assistance and advice to VWoA, to the extent VWAG deems appropriate. Sales

summaries compiled by VWAG are to be used by VWoA in a manner the latter decides will be helpful in establishing and equipping its sales network. VWoA is required to keep VWAG fully informed of all aspects of its business. Either party can terminate the agreement but VWoA is entitled to no damages upon termination.

VWoA does not publish an annual report, but is listed on a consolidated financial sheet for the VW Group. The production, performance, purchasing and dividends of VWoA are all detailed as a part of the world-wide Volkswagen network. Eight of fourteen members of the board of directors of VWoA are directors of VWAG and West German residents. Five of seven VWoA board meetings conducted in 1983 and 1984 were conducted in West Germany.

The above indicia bear comparison with those found in the case of *Braband v. Beech Aircraft* (1978), 72 Ill. 2d 548, 382 N.E.2d 252, *cert. denied* (1979), 442 U.S. 928, 61 L. Ed. 2d 296, 99 S. Ct. 2857, in which plaintiffs brought a wrongful death action against the Kansas manufacturer of an airplane that crashed in Canada on its way from Illinois. Service was made upon Hartzog Aviation Co., the Illinois distributor of defendant's products. The supreme court held that the agreed facts showed that defendant engaged in sufficient activities in its own right and that it was unnecessary to decide whether Hartzog's activities standing alone would be a sufficient basis for jurisdiction. Defendant had entered into a written agreement allowing Hartzog to sell defendant's products in a given area of Illinois, and to perform all warranty, maintenance and repair service on defendant's planes regardless of whether they were sold by Hartzog. Defendant was empowered to inspect Hartzog's complete operation from time to time, and could terminate the sales agreement without notice under certain conditions. Defendant's marketing manager frequently visited Hartzog for the express purpose of promoting sales of defendant's aircraft, and defendant, together with Hartzog, had sponsored a slide show and dinner for sales prospects. Advertising appeared for at least five years in Chicago area phone directories indicating where defendant's products could be purchased. The court found "defendant to be present and doing business in Illinois and to be amenable to service of process under sections 13.3 and 16 of the Civil Practice Act." (72 Ill. 2d 548, 559-60, 382 N.E.2d 252, 257.) Section 13.3 has now been recodified as Ill. Rev. Stat. 1985, ch. 110, par. 2-204 (*see* A. Jenner, P. Tone and A. Martin, Historical and Practice Notes, Ill. Ann. Stat., ch. 110, par. 2-204, at 159 (Smith-Hurd 1983)), which provides in relevant part: "A private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter provided by law." Thus the *Braband* court must have concluded that Hartzog was defendant's agent for service of process, or that the mode of service was otherwise in proper manner "provided by law."

Earlier, this court produced three separate opinions in the case. (*Braband v. Beech Aircraft Corp.* (1977), 51 Ill. App. 3d 296, 367 N.E.2d 118, *aff'd on other grounds* (1978), 72 Ill. 2d 548, 382 N.E.2d 252, *cert. denied* (1979), 442 U.S. 928, 61 L. Ed. 296, 99 S. Ct. 2857.) Justice Jiganti concluded that defendant was subject to long-arm jurisdiction because it had committed a tortious act in Illinois. (51 Ill. App. 3d 296, 297-303, 367 N.E.2d 118, 120-24.) Justice Downing, dissenting, felt that the exercise of jurisdiction was improper (51 Ill. App. 3d 296, 307-13, 367 N.E.2d 118, 127-31), and Justice Stamos concluded that defendant was "amenable to service of process in Illinois by virtue of its contractual relationship with its distributor, Hartzog." (51 Ill. App. 3d 296, 303, 367 N.E.2d 118, 124.) In addition to defendant's activities discussed above, Justice Stamos noted

that the distributorship arrangement disclosed that, while there were no overlapping directorships, defendant enjoyed extensive control over Hartzog. Hartzog was required to price the planes it sold, and to submit purchase orders for all airplanes to the defendant for its approval. Hartzog was also required to devote its full sales efforts to defendant's aircraft, and maintain records and advertise solely according to the directives of defendant. Hartzog had to perform all warranty maintenance and repair of defendant's aircraft no matter where they were purchased, and Hartzog could not move its place of business without obtaining prior written consent of defendant. Justice Stamos wrote:

> "Such evidence overwhelmingly demonstrates a series of corporate operations by [defendant], both directly and through its distributor, sufficient to establish its presence in the State of Illinois within the context of *International Shoe*. • • •
>
> Nor can it be doubted that these activities are sufficiently pervasive to justify the exercise of jurisdiction over a cause not directly related to those activities. The annual volume of business conducted by Hartzog does not appear of record. However, it is not disputed that the day-to-day sales and service of [defendant's] aircraft conducted by an apparently solvent firm, such as Hartzog Aviation, constitutes activity which may be fairly categorized as a substantial and systematic business operation. As previously noted, within this context, Beech controls Hartzog's sales and service policies, facilities, public relations, accounts and records, and marketing practices. This activity leaves small doubt that Beech has intentionally entered the Illinois market and is actively doing business in this State. Rather than use its own directly employed personnel, the corporation chose to enter into the State by acquiring broad supervisory control over a distributor-sales-corporation.

> The nature of this broad control and the extent to which it was exercised is an adequate basis for finding Hartzog to be the agent of [defendant] and, thus, the proper and capable recipient of service of process upon [defendant]." (51 Ill. App. 3d 296, 306, 367 N.E.2d 118, 126.)

While no two corporations have the same arrangements, and hence no two cases will be exactly alike, we conclude that, in accord with *Maunder v. DeHavilland Aircraft of Canada, Ltd.* (1984), 102 Ill. 2d 342, 466 N.E.2d 217, *cert. denied*, —— U.S. ——, 83 L. Ed. 2d 401, 105 S. Ct. 511 and the concurring opinion in *Braband v. Beech Aircraft Corp.* (1977), 51 Ill. App. 3d 296, 303-07, 367 N.E.2d 118, 124-27, *aff'd on other grounds*, (1978), 72 Ill. 2d 548, 382 N.E.2d 252, *cert. denied* (1979), 442 U.S. 928, 61 L. Ed. 2d 296, 99 S. Ct. 2857, the circuit court was correct in ruling that VWoA was an agent for service of process of VWAG. As in *Maunder*, the subsidiary here is wholly owned by its parent, and exists predominantly to promote the sale and distribution of its parent's products in this country. As in *Braband*, VWoA has bound itself to sell VWAG's products within its territory and to maintain and repair VWAG's automobiles regardless of where they were sold. VWAG is empowered to terminate the importer agreement without prior notice if VWoA experiences business or financial difficulties. VWAG controls VWoA's choices of dealers, the designation of VWoA's products and services, stock levels, and methods of ordering. In addition it dominates the VWoA Board and often conducts VWoA board meetings in its own domicile. VWoA is required by contract to keep VWAG apprised of all aspects of its business, and is authorized to prosecute trademark infringement suits in VWAG's name. In short, the relationship between VWAG and VWoA is so close that it is certain that VWAG "was fully apprised of the pendency of the action" by delivery of the summons to VWoA.

Maunder v. DeHavilland Aircraft of Canada (1984), 102 Ill. 2d 342, 466 N.E.2d 217, 233, *cert. denied*, —— U.S. ——, 83 L. Ed. 2d 401, 105 S. Ct. 511.

VWAG cites *People v. Parsons Co.* (1984), 122 Ill. App. 3d 590, 461 N.E.2d 658, and states "the court held that even though the foreign parent corporation held a majority of interest in the subsidiary corporation, placed its officers on the subsidiary's board of directors, transferred several of its employees to the subsidiary and financed and subsidized the subsidiary through loans, the parent's control over the subsidiary was not so pervasive that the parent was '*transacting business* in Illinois'." (Emphasis supplied.) However the court stated:

> "Initially we emphasize that the State's allegation of Dickey-Grabler's control over Parsons relates only to the question whether jurisdiction over Dickey-Grabler exists under the Illinois long-arm statute. [Ill. Rev. Stat. 1985, par. 110, ch. 2-209.] The State does not contend that Dickey-Grabler is 'doing business' in Illinois through its subsidiary, or that Parsons is a constructive agent for Dickey-Grabler for the purposes of service of process here." (122 Ill. App. 3d 590, 595, 461 N.E.2d 658, 663.)

Thus, the precise questions presented in this case were expressly excluded from consideration in *Parsons*.

VWAG has included several form franchise agreements in the appendix of its main brief, and argues that the obligations imposed on VWoA are no more onerous than those accepted by franchisees under contracts that are typically offered on a "take it or leave it" basis. In *Slates v. International House of Pancakes, Inc.* (1980), 90 Ill. App. 3d 716, 413 N.E. 2d 457, the plaintiff was scalded with hot coffee while in a restaurant. He sued over the injuries, and attempted to serve the franchisor, a California corporation, by leaving process with a franchisee in Champaign, Illinois. The franchise agreement granted the franchisee the use of tradmarks, trade

names, insignia, labels or designs, trade secrets, formulas, methods of operation, and good will. (90 Ill. App. 3d 716, 727, 413 N.E.2d 457, 465.) The agreement provided that the restaurant would be called International House of Pancakes without any suffix or prefix. The restaurant could serve and sell only items expressly designated and approved in writing by defendant. The franchisee could purchase all flour and pancake mixes only from defendant or from suppliers approved in writing by it. The defendant was authorized to promulgate a manual binding on the franchisee that covered, *inter alia*, training and supervision, quality control, record keeping, inspection, hours of operation, advertising, preparation of food and relations with suppliers. The appellate court stated:

> "The trial court in the instant case specifically stated that it felt the amount of control exercised by IHOP-Cal was customary in a franchise agreement. The court was not pursuaded that IHOP-Cal exercised such control over IHOP-Champaign so as to make the latter an agent for service of process. While we agree with the plaintiff that the agreement gives the defendant a high degree of supervision over the methods and operations of IHOP-Champaign, our examination of the agreement indicates that this control was not so all encompassing as to negate the express intention of the parties in the franchise agreement that no agency relationship was created. The trial court did not abuse its discretion." (90 Ill. App. 3d 716, 727, 413 N.E.2d 457, 466.)

While it may be true that franchise agreements typically provide for extensive supervision and control by the franchisor, there is one key distinction in the instant case. Franchisees, such as the one in *Slates*, are independent and can accept or reject the terms of the franchise. In the present case, VWoA was entirely owned by VWAG, and its board was dominated by VWAG officials. VWoA exercises no free will of its own in deciding whether to

accept the importer agreement or any other aspect of its relationship with VWAG. Therefore, cases involving service on a franchisee do not provide a good analogy to the present case.

VWAG finally argues that if this court decides that service of process was valid, it could affect its right to remove the case to Federal court, because a removal petition must be filed within thirty days after service of the summons. (28 U.S.C.A. § 1446(b) (1973).) VWAG has not indicated that it would in fact seek removal or that there is any basis for Federal jurisdiction. In any event, VWAG could have removed the case to Federal court without waiving its right to challenge the service in that forum. (*See Zisman v. Sieger* (N.D. Ill. 1985), 106 F.R.D. 194, 196; 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3738 (1985).) Therefore, this argument is without merit.

It is clear under Illinois law that "[w]here the facts indicate that one corporation so controls the affairs of another corporation that the two entities are essentially one, the court will disregard the corporate entities and hold service of process on one corporation effective as to the others." (*Rymal v. Ulbeco, Inc.* (1975), 33 Ill. App. 3d 799, 803, 338 N.E.2d 209, 213.) However, under prior decisions in this state, discussed above, it is not necessary that the relationship go so far. While courts in other jurisdictions have looked to whether a subsidiary is an alter-ego or mere department of its parent, Illinois courts have avoided such labels in considering service of process. We conclude that the relationship between VWoA and VWAG was such that VWAG was properly found to be an agent for service of process of VWoA by operation of law. The decision of the circuit court denying VWAG's motion to quash is affirmed.

AFFIRMED.

BILANDIC, P.J. and HARTMAN, J., concur.

APPENDIX B

ORDER OF THE SUPREME COURT OF ILLINOIS

JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1986

Mr. James K. Toohey
Ross & Hardies
150 North Michigan Avenue, Suite 2500
Chicago, IL 60601

No. 63765—Herwig J. Schlunk, as Admr., etc., respondent, v. Volkswagenwerk Aktiengesellschaft, etc., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

APPENDIX C

ORDER OF THE SUPREME COURT OF ILLINOIS

No. 63765

HERWIG J. SCHLUNK, AS ADMR., ETC.,
Respondent

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, ETC.,
Petitioner

Appeal from Appellate Court
First District
AC1-85-3169
84 L 11493

ORDER

This matter has come for consideration upon the motion of *petitioner* to recall and stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is recalled and stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such

application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ D. P. Ward
Justice

[Filed Oct. 28, 1986]

APPENDIX D

ORDER OF THE CIRCUIT COURT
OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

No. 84 L 11493

HERWIG J. SCHLUNK, as Administrator of the Estate of FRANZ J. SCHLUNK, Deceased, and HERWIG J. SCHLUNK, as Administrator of the Estate of SYLVIA SCHLUNK, Deceased,

Plaintiffs,

v.

DENNIS J. REED, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, and VOLKSWAGENWERK A.G., a foreign corporation,

Defendants.

ORDER

THIS CAUSE COMING TO BE HEARD ON motion of defendant Volkswagenwerk Aktiengesellschaft ("VWAG") to quash service of summons purportedly made upon it through service upon Volkswagen of America, Inc. ("VWoA"); due notice given and the parties having filed memoranda and exhibits in support and in opposition to said motion and the Court being advised in the premises:

This Court hereby finds from the record before it that:

1. VWoA is a New Jersey corporation with its principal place of business in Michigan and registered to do

business in Illinois with a registered agent for receipt of process in Illinois.

2. VWAG has not appointed VWoA as its agent for service of process in common law actions brought against it in Illinois or in any other state in the United States.

3. VWoA is a wholly-owned subsidiary of VWAG, a majority of the members of the board of directors of VWoA are members of the board of management of VWAG, and VWoA is the exclusive importer and distributor of VWAG products sold in the United States pursuant to a manufacturer-importer agreement entered into between VWAG and VWoA.

Based upon the foregoing findings, this Court concludes as a matter of law that:

1. VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent.

2. Because VWoA is VWAG's agent for service of process as a matter of law and because VWoA is located physically within the United States, plaintiff's service of process upon VWoA as agent of VWAG is effective service of process upon VWAG under the Illinois Supreme Court Rules and Illinois Code of Civil Procedure, and such service is not in conflict with "The Convention On The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (commonly known as the "Hague Service Convention"), which Convention is applicable only to service of process outside of the United States.

Accordingly, it is ordered that VWAG's motion to quash service upon VWoA as service upon it is denied.

Pursuant to Supreme Court Rule 308(a) and upon application by VWAG, this Court finds that there is substantial ground for difference of opinion and that an im-

mediate appeal from this order may materially advance the ultimate termination of the litigation; and accordingly, this Court certifies to the Appellate Court the following questions of law:

1. Whether VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent?

2. Whether because VWoA is VWAG's agent for service of process as a matter of law and because VWoA is located physically within the United States, plaintiff's service of process upon VWoA as agent of VWAG is effective service of process upon VWAG under the Illinois Supreme Court Rules and Illinois Code of Civil Procedure, and such service is not in conflict with "The Convention On The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (commonly known as the "Hague Service Convention"), which Convention is applicable only to service of process outside the United States?

It is further ordered that all further proceedings against VWAG are stayed pending the appeal of this certified question to the Appellate Court.

Dated: Oct. 1, 1985

ENTERED:

/s/ Judge Myron Gomberg
Circuit Court

APPENDIX E

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, DONE AT THE HAGUE NOVEMBER 15, 1965; ENTERED INTO FORCE FOR THE UNITED STATES FEBRUARY 10, 1969; 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163.

with

DESIGNATIONS AND DECLARATIONS BY MEMBER STATES

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for

service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

a) by a method prescribed by its internal law for the the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by

a) the employment of a judicial officer or of a person competent under the law of the State of destination.

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3.

b) the language requirements of the third paragraph of article 5 and article 7.

c) the provisions of the fourth paragraph of article 5.

d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

a) the designation of authorities, pursuant to articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally

applicable to the present Convention, unless the parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has

ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

a) the signatures and ratifications referred to in article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

c) the accessions referred to in article 28 and the dates on which they take effect;

d) the extensions referred to in article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in article 21;

f) the denunciations referred to in the third paragraph of article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

ANNEX TO THE CONVENTION

Forms

REQUEST
FOR SERVICE ABROAD OF JUDICIAL
OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, ———— 196 .

Identity and address of the applicant

Address of receiving authority

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, *i.e.* (identity and address) ————————

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention *

(*b*) in accordance with the following particular method (sub-paragraph (*b*) of the first paragraph of article 5) *

(*c*) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5) *

The authority is requested to return or have returned to the applicant a copy of the documents—and of the annexes *—with a certificate as provided on the reverse side.

List of documents

_____

_____

Done at —— the ——
Signature and or stamp

* Delete if inappropriate.

INTERNATIONAL JUDICIAL ASSISTANCE

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention.

1) that the document has been served *

—the (date)

—at (place, street, number)

—in one of the following methods authorized by article 5—

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention *

(*b*) in accordance with the following particular method *

(*c*) by delivery to the addressee, who accepted it voluntarily *

The documents referred to in the request have been delivered to

—(identity and description of person)

—relationship to the addressee (family, business or other)

2) that the document has not been served, by reason of the following facts *

_____

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement *

Annexes

Documents returned

_____

_____

In appropriate cases, documents establishing the service

_____

_____

Done at ——— the ———
Signature and/or stamp

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

———

Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters, signed at The Hague, the ———— 196 .

(article 5, fourth paragraph)

Name and address of the requesting authority

_____

Particulars of the parties *

_____

JUDICIAL DOCUMENT **

Nature and purpose of the document

_____

_____

Nature and purpose of the proceedings and, where appropriate, the amount in dispute

_____

Date and place for entering appearance **

_____

Court which has given judgment **

_____

Date of judgment **

_____

Time limits stated in the document **

_____

EXTRAJUDICIAL DOCUMENT **

Name and purpose of the document

Time limits stated in the document **

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* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

GERMANY, FEDERAL REPUBLIC OF

Ratified: April 27, 1979
Entered into force: June 26, 1979
Declaration of: April 27, 1979

(1) Requests for service shall be addressed to the Central Authority of the Land where the request is to be complied with. The Central Authority pursuant to Article 2 and paragraph 3 of Article 18 of the Convention shall be for:

Baden-Württemberg	Das Justizministerium Baden-Württemberg (The Ministry of Justice of Baden-Württemberg), D 7000 Stuttgart, West Germany
Bavaria	Das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 Munchen, West Germany
Berlin	Der Senator für Justiz (The Senator of Justice), D 1000 Berlin, West Germany
Bremen	Der Präsident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen, West Germany
Hamburg	Der Präsident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg, West Germany

Hesse	Der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden, West Germany
Lower Saxony	Der Niedersächsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover, West Germany
Northrhine-Westphalia	Der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine-Westphalia), D 4000 Düsseldorf, West Germany
Rhineland-Palatinate	Das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz, West Germany
Saarland	Der Minister für Rechtspflege (The Minister of Justice), D 6600 Saarbrücken, West Germany
Schleswig-Holstein	Der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land Schleswig-Holstein), D 2300 Kiel, West Germany

The Central Authorities are empowered to have requests for service complied with directly by postal channels if the conditions for service in accordance with paragraph 1(a) of Article 5 of the Convention have been fulfilled. In that case the competent Central Authority will hand over the document to the postal authorities for service. In all other cases the local court (Amtsgericht) in whose district the documents are to be served shall be

competent to comply with requests for service. Service shall be effected by the registry of the local court. Formal service (paragraph 1 of Article 5 of the Convention) shall be permissible only if the document to be served is written in, or translated into, the German language.

(2) The Central Authority shall complete the certificate (paragraphs 1 and 2 of Article 6 of the Convention) if it has itself arranged for the request for service to be complied with directly by postal channels; in all other cases this shall be done by the registry of the local court.

(3) The Central Authority of the Land where the documents are to be served and the authorities competent under Section 1 of the Act of 18th December 1958 implementing the Convention on Civil Procedure, signed at The Hague on 1st March 1954, to receive requests from consuls of foreign States, shall be competent to receive requests for service transmitted by a foreign consul within the Federal Republic of Germany (paragraph 1 of Article 9 of the Convention). Under that Act the president of the regional court (Landgericht) in whose district the documents are to be served shall be competent; in his place the president of the local court shall be competent if the request for service is to be complied with in the district of the local court which is subject to his administrative supervision.

(4) In accordance with paragraph 2(a) of Article 21 of the Convention, the Government of the Federal Republic of Germany objects to the use of methods of transmission pursuant to Articles 8 and 10. Service through diplomatic or consular agents (Article 8 of the Convention) is therefore only permissible if the document is to be served upon a national of the State sending the document. Service pursuant to Article 10 of the Convention shall not be effected.

OPPOSITION

BRIEF

No. 86-1052

In The
Supreme Court of the United States

October Term, 1986

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK,
As Administrator of the Estates of
FRANZ J. SCHLUNK, Deceased,
and
SYLVIA SCHLUNK, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JACK SAMUEL RING
Counsel of Record
JUDITH E. FORS
JACK SAMUEL RING & ASSOCIATES, LTD.
69 W. Washington Street
Chicago, Illinois 60602
(312) 782-5462
Attorneys for Respondent

Pandick Technologies, Inc., Chicago • (312) 236-0200

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QUESTION PRESENTED FOR REVIEW

Whether the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents is applicable to service upon a West German corporation when service is accomplished entirely within the United States through service upon the corporation's wholly-owned and closely controlled subsidiary.

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TABLE OF AUTHORITIES

No. 86-1052

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and
SYLVIA SCHLUNK, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Respondent and plaintiff below, Herwig Schlunk, as Administrator of the Estates of Franz J. Schlunk and Sylvia Schlunk, Deceased, files this Brief in Opposition to the Petition for Writ of Certiorari of Volkswagenwerk Aktiengesellschaft.

PRELIMINARY STATEMENT

Having lost an essentially factual argument in the Illinois courts as to its relationship with its wholly-owned subsidiary, petitioner attempts to manufacture an issue for review by this Court where none exists. Petitioner's argument to this Court - that the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents must be applied to all attempts to serve West German nationals, even if they, or their agents, are found within the United States - is not only contrary to the clear language of the treaty and the intentions of its signatories, but is also contrary to the position taken by the petitioner before the Illinois Supreme Court where it represented that had its subsidiary been labelled a "mere instrumentality", service outside of the Convention would not have been objectionable.

Petitioner also unsuccessfully tries to manufacture a conflict among the courts which have addressed a variety of attempts to obtain service on foreign defendants. However, a review of the cases cited by the petitioner demonstrates that each case turned on its own facts and has no factual or legal analogy to the case at bar.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE HAGUE CONVENTION ON SERVICE OF PROCESS IS INAPPLICABLE TO SERVICE UPON AN AGENT OF A FOREIGN CORPORATION WITHIN THE UNITED STATES

Petitioner, Volkswagenwerk Aktiengesellschaft (VWAG), has no just basis for asking this Court to exercise *certiorari* jurisdiction. VWAG's contention that the Illinois Appellate Court's ruling is in conflict with the Hague Convention On Service Abroad of Judicial and Extra-Judicial Documents *(done* November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163), is based upon the false premise that the Convention was

intended to apply to *all* service upon nationals of signatory countries even when the defendant, or an agent of the defendant, is found within the United States. (*See, e.g.*, pet. p. 2, 3, 4, 8, 17)[1] As noted by the Illinois Appellate Court, this position simply does not survive scrutiny. *Schluk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 595, at 596-599, 495 N.E.2d 1114 (1986).

To begin with, Article I of the Convention, like the title to the Convention, provides in relevant part:

> The present Convention shall apply in all cases, in civil or commercial matters, *where there is occasion* to transmit a judicial or extra-judicial document *for service abroad. Id.* at 596 (Emphasis added by Appellate Court).

VWAG argues that these words are somehow ambiguous, and cannot possibly stand for the obvious result that the Convention applies only when service is made within the boundaries of a foreign signatory. In making this argument, VWAG ignores the admonition of this Court in *Maximov v. United States*, 373 U.S. 49, 54 (1963):

> [I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.

The Convention at issue is not entitled "The Hague Convention On Service Upon Foreign Nationals". Its

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[1] Interestingly, in its petition for leave to appeal to the Illinois Supreme Court, defendant accepted the inconsistent position that if a court determined that its subsidiary, Volkswagen of America (VWoA), was a "mere instrumentality" of VWAG, the finding of agency, and service outside of the Convention would not have been objectionable.

title and many of its provisions clearly show that it is a "Convention On Service Abroad . . . " Thus, the plain language of the Convention not only fails to support defendant's premise, but is contrary to it.

The Illinois Appellate Court's ruling regarding the inapplicability of the Convention is consistent with the holdings of the other courts which have addressed this issue. All have held that the Convention does not apply when service on a foreign defendant is accomplished upon an agent of that defendant within the United States. *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95 (S.D. Fla. 1985); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *McHugh v. International Components Corp.*, 118 Misc.2d 489, 461 N.Y.S.2d 166 (1983).

In *Lamb*, VWAG, in a motion to reconsider denial of its motion to quash service upon it through VWoA, argued (as it does here), that the Convention was applicable whenever service on a foreign defendant was sought. The plaintiffs in *Lamb*, like plaintiff herein, argued that if service upon an agent of the defendant found within the United States was possible, the Convention did not apply. The Court agreed with the plaintiff, stating:

> By its terms, The Hague Convention is applicable only to attempts to serve process in foreign countries. Both the introduction and Article 1 refer to the transmission of judicial documents, in civil matters, for service ABROAD. The purpose of the Hague Convention is to simplify the procedure for serving judicial documents abroad to ensure that the party to be served in the foreign country will receive notice in timely fashion. There is nowhere among the provisions of the Hague Convention any indication that it is to control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin. To ask a Court to find such an indication within the meaning of the Convention's language

> is to ask that a new treaty be fashioned by the Court. A Court may interpret but should not write the law. If the service of process in the instant case had been attempted directly on VWAG in the Federal Republic of Germany, then the provisions of The Hague Convention would have to be complied with. In this case, however, service of process was entirely accomplished within the United States by serving [VWoA] the agent of the Defendant VWAG; the provisions of The Hague Convention are simply inapplicable. *Lamb*, *supra*, at 97.

The logic of the *Lamb* court on this issue is, we submit, compelling. The Illinois Appellate Court in the case at bar was clearly correct in reaching the same result.

In *Zisman v. Sieger*, 106 F.R.D. 194 (N.D.Ill. 1985), Judge Will of the District Court for the Northern District of Illinois reached this same conclusion in a case involving service upon the Illinois agent of a wholly-owned subsidiary of a Japanese corporation:

> By its terms the "Hague Convention is applicable only to attempts to serve process in foreign countries . . . [It does not] control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin." *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 97 (S.D.Fla. 1985). In *Lamb*, as in this case, service of process was entirely accomplished within the United States by serving the agent of the foreign defendant. The court found that the Hague Convention was inapplicable in determining the validity of service of process under the common law agency theory when the foreign corporation or its agent is located and served within the United States. Since we have held that FMI is the agent of Fujitsu Ltd. for the purpose of effecting valid service of process on Fujitsu Ltd. the only real question is whether service, as attempted, is sufficient under Rule 4. *Zisman*, *supra*, at 199-200.

The court in *McHugh v. International Components, Corp.*, 118 Misc.2d 489, 461 N.Y.S.2d 166 (1983), also held the Convention inapplicable to service upon an agent of a foreign defendant found within the United States:

> Assuming for the moment that for jurisdictional purposes, Marcon Japan and Marcon America are the same entity (see *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322), Marcon Japan's reliance on the "Hague Convention" is misplaced. The purpose of that treaty, as is clearly set forth in its title and declarations, is for assuring sufficient notice when service is made in a foreign country. *McHugh, supra*, 461 N.Y.S.2d at 167.

Another decision touching on this issue is *Ex Parte Volkswagenwerk Aktiengesellschaft*, 443 So.2d 880 (Ala. 1983). In that case, the plaintiff attempted service upon VWAG by mailing a copy of the summons and complaint to VWAG in West Germany and by serving Volkswagen of America in the United States. VWAG moved to quash on two grounds; first, because service by mail within West Germany violated the Hague Convention, and second, because VWoA was not its agent for accepting service of process. The Alabama Supreme Court affirmed the trial court's order denying VWAG's motion to quash, stating:

> We need not address the first issue. The respondents, Judge Fred Nicol and David K. Brown, have admitted, in their brief in support of their answer to the petition for writ of mandamus, that the provisions of the Hague Convention must be complied with if service of process is attempted directly on VWAG in West Germany. These provisions were not complied with here. Nevertheless, they contend that the Hague Convention's provisions are inapplicable in this case, since VWoA is the *alter ego*, and therefore the agent, of VWAG in the United States for the purpose of service of process.

> Our inquiry, then, is limited to the issue of whether VWoA can be considered the agent of VWAG for the purpose of service of process; if so, then the summons and complaint served on VWoA on the behalf of VWAG is good and sufficient service on VWAG. After careful consideration of the salient facts involved, we conclude that the trial court was correct in overruling its prior grant of the motion to quash, and we, therefore, deny the writ of mandamus. *Id.* at 881.

Obviously, if service is made upon a corporate subsidiary which has, by a defendant's own dealings, been established as its *alter ego* or agent for service of process, the defendant will have actual notice - as VWAG does here - of the proceedings against it.

In this regard, it is interesting to note that VWAG conceded, at oral argument in the trial court of its motion to quash, that if VWAG had appointed VWoA as an agent for acceptance of service of process, the Convention would not apply. Respondent submits that any attempt to condition application of the Convention on a distinction between an "appointed" agent and one established by VWAG's dealings with its subsidiary, must fail. It makes no difference how VWoA came to be VWAG's agent - the Convention simply does not apply to service upon VWAG's agent - established through its own conduct - within the United States.

Similarly, in its petition to the Illinois Supreme Court, VWAG again manufactured a distinction without a difference. Before the Illinois Supreme Court, VWAG accepted the position that had VWoA been found to be a "mere instrumentality" of VWAG, the finding of agency, and service outside of the Convention would not have been objectionable. The mere fact that the courts of Illinois do not use such labels in determining that the parent - subsidiary relationship is sufficiently close to allow service on the parent through the subsidiary is not a valid basis for objecting to the ruling in the case at bar.

The remainder of VWAG's arguments are based upon speculation or upon misrepresentations as to practice under the Convention.

First, defendant's saber rattling about possible retaliation by foreign governments, is pure speculation. Such innuendos have no place in the decision making process of our courts. In addition, the service permitted here is not at all analogous to the supposed retaliation - *notification au parquet*, a practice which permitted default judgments on American defendants based upon service in Europe upon a local official who had no relationship whatsoever with the defendant. In contrast, the agent served in this case is a wholly-owned and closely controlled subsidiary of the defendant.

So too, VWAG's claim that its rights are endangered unless it is served with a pleading translated into German rings hollow to this plaintiff in light of the offer made by counsel for VWAG to accept an abbreviated version of plaintiff 's forty-two page amended complaint if only plaintiff would utilize the Hague Convention mechanism.

Further, VWAG's feigned astonishment that a plaintiff would not be eager to utilize a convention which, according to VWAG, only facilitates service, also seems less than sincere in light of the experience of another attorney who attempted to use the Convention to serve VWAG, but whose pleading was rejected by the German government in violation of the Convention because it requested punitive damages against VWAG. (See Declaration of Kevin R. Culhane, copies of which have been lodged with the Clerk of this Court.)

Respondent respectfully suggests that this Court should evaluate VWAG's arguments as to these issues not in the vacuum created by VWAG, but in light of the actions actually taken with regard to service.

VWAG's arguments regarding a need for consistency for foreign defendants also ignore reality. The rights of foreign litigants have not been endangered by the decision of the Illinois Appellate Court. To begin with, it is simply not true that uniformity of procedure was the prime purpose behind the Convention. The Convention itself shows that exact uniformity is not the goal - many signatory countries have submitted modifications to the Convention provisions. Further, in the *Practical Handbook On the Operation of the Hague Convention of 15 November 1965 On the Service Abroad of Judicial and Extra-Judicial Documents In Civil Or Commercial Matters*, Maarten Kluwer, The Netherlands (1983), authored by the Hague Conference on Private International Law, the Conference made it clear that the prime purpose of the Convention is to assure *notice*:

> To establish a system which, to the extent possible, brings actual notice of the documents to be served to the recipient in sufficient time to enable him to defend himself. *Id.*, at 28.

Clearly,VWAG received prompt notice of this action through VWoA; its appearance was filed well within the thirty day period permitted by the summons. [2]

Nor is consistency for foreign defendants doing business in the United States a valid reason for altering the clear wording of the Convention or disregarding Illinois laws on agency and service of process. Considering the tremendous profits reaped by a company such as VWAG, subjecting it to the laws of each jurisdiction with which it has sufficient contacts for purposes of *in personam* jurisdiction is but a small price to pay - a price paid by every American corporation selling on a national basis. Further, even if consistency for a foreign corporation were a proper concern, then consideration of the issue supports

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[2] Thus, VWAG's alarm over loss of the right to remove a case to the federal court is based upon speculation and not reality. VWAG could have taken such action in this case, but made a decision not to do so.

the Illinois Appellate Court's holding since every other court in the United States which has addressed the issue has ruled the Convention inapplicable to service upon an agent within the United States. (*Lamb, Zisman, McHugh, Ex Parte Volkswagenwerk Aktiengesellschaft, supra*).

Finally, if more were needed, two authorities close to the Convention should confirm that the treaty is inapplicable to service within the United States on VWAG's corporate subsidiary and *alter ego* or agent, VWoA. First, in the explanatory report on the final text of the Convention, under the heading, "Obligatory Character of the Convention", the reporter stated:

> It was agreed that the Convention covered two operations: *the transmission of a judicial document from the requesting state to the requested state*, and its *service* on the addressee of the document. (Ristau, *International Judicial Assistance, (Civil and Commercial)* (1985) The International Law Institute, p.131. (emphasis added).

In addition, in a Diplomatic Note from the Federal Republic of Germany to the United States, the applicability of the Convention solely to service within Germany was made clear:

> Since the Hague Convention on the Service of Documents has gone into effect between the United States of America and the Federal Republic of Germany on June 26, 1979, the Federal Government would appreciate it if *service* of documents originating from American judicial proceedings *to persons within the Federal Republic of Germany* would be conducted in compliance with this convention only and if the courts and attorneys involved could be informed accordingly. Ristau, *supra*, at p.81. (emphasis added).

The Illinois Appellate Court was clearly correct in ruling, as it did, that the convention is inapplicable to service within the United States on an agent of VWAG. A court would have to rewrite the Convention to hold otherwise

- a practice which this Court has held "particularly inappropriate" when there is no indication that application of the words of the treaty according to their obvious meaning effects a result contrary to expectations of the signatories. *Maximov, supra.* The remainder of the Illinois Appellate Court ruling, *i.e.*, its finding that VWoA is VWAG's agent for accepting service of process, is essentially a factual ruling, based upon well settled principles of law, which has not been challenged by VWAG in its petition and which certainly does not merit the exercise of *certiorari* jurisdiction by this Court.

II.

THE CASES CITED BY VWAG QUASHING SERVICE OF SUMMONS DO NOT CONFLICT WITH THE HOLDING OF THE ILLINOIS APPELLATE COURT IN THE CASE AT BAR

VWAG's attempt to manufacture a conflict among the courts which have addressed service under the Hague Convention also fails. In many of the cases cited by VWAG, the courts, in quashing service done in a manner which violated the Convention, specifically noted that the plaintiff had not proved (or attempted to prove) the *alter ego* or agency status of the United States subsidiary. Such statements clearly indicate that such proof would have rendered the Convention inapplicable.

For example, in *Hamilton v. Volkswagenwerk Aktiengesellschaft*, No. 81-01-L (D.N.H. 1981), after determining that service on the New Hampshire Secretary of State with instructions to mail summons to VWAG in West Germany was in violation of the Convention, the Court stated, "The question remains whether VWoA is merely the *alter-ego* of VWAG so that service upon VWoA is effective as to VWAG." (folio p. 6). The plaintiff in *Hamilton*, unlike the plaintiff in the case at bar, submitted *no evidence* of such an *alter ego* status, so that the court found it had no choice but to grant the motion to quash. (folio p. 6-7).

An identical situation confronted the court in *Richardson v. Volkswagenwerk A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982), and a consistent result was reached. Again, the court stated that "The question remains whether VWoA is merely the *alter-ego* of VWAG so that service upon VWoA is effective as to VWAG." (*Richardson, supra*, at 79).

So too, in *Low v. Bayerische Motoren Werke, A.G.*, 449 N.Y.S. 2d 733 (App. Div. 1982), the court quashed service through the New York Secretary of State (perfected by mailing the summons and complaint to West Germany) and quashed plaintiff's attempt to serve the agent designated by BMW-AG under the Motor Vehicle Safety Act, stating, "The record herein does not support a finding that BMW-NA was so completely controlled by BMW-AG that it was a mere department of BMW-AG." *Low, supra*, at 735-736.

Similarly, in *Utsey v. Volkswagen of North America*, No. 80-1620-9 (D.S.C. 1981), the court stated, "Plaintiffs have the burden of proving proper service of the summons and complaint, which entails establishing the agency of the person or entity receiving the process." (folio p. 5). Again, the plaintiff in *Utsey* produced *no evidence* of an agency relationship between VWoA and VWAG, but clearly, if such agency had been demonstrated, the court would have found the Convention inapplicable and upheld service.

In an attempt to fashion an argument that the Convention applies regardless of the existence of an agent within the United States, VWAG relies primarily upon broad language snatched from opinions which never even addressed the issue. (See: *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D.La. 1984); *Doctor Ing. H.C.F. Porsche, A.G. v. Superior Court*, 123 Cal.App.3d 755, 177 Cal. Rptr. 155 (1981); and *Mommsen v. Toro Co.*, 108

F.R.D. 444 (S.D. Iowa 1985)). In each of these cases, the Courts correctly found the Convention controlling with regard to service abroad, but none of them ever addressed the effect of serving a subsidiary as the agent of a foreign corporation *within* the United States. Read in context, it is obvious that any broad statements made in these cases regarding the scope of the Convention do not even rise to the status of *dicta*, much less *stare decisis*.

Likewise, VWAG's representations regarding the holding of the Rhode Island Supreme Court in *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985), do not survive scrutiny. In *Cipolla*, the Rhode Island Supreme Court struck down an attempt to obtain service on VWAG through service on the Rhode Island Secretary of State. Under the law of Rhode Island, the Secretary of State perfects such service by mailing the summons and complaint to the defendant corporation at its principal place of business. (R.I.G.L. Sections 7-1.106, 7-1.108). Thus, this method of service is in clear conflict with West Germany's objections to service by mail under the terms of the Hague Service Convention.

For similar reasons, the Rhode Island Supreme Court also apparently rejected service under Rhode Island R.C.P. 4(e) (2), which permits service by registered or certified mail upon foreign corporations. These were the only statutes addressed in *Cipolla*.

VWAG then represents to this Court that the plaintiff in *Cipolla*, like the plaintiff in the case at bar, demonstrated that VWoA was the agent of VWAG, but that the Rhode Island Supreme Court also rejected this approach. In fact, the brief from *Cipolla* lodged by VWAG with the Clerk of this Court shows that such was not the case. The plaintiff in *Cipolla* relied merely on VWAG's appointment of VWoA as its agent under the National Motor Vehicle Safety Act of 1966 (as amended), 15 U.S.C. Section 1381 *et seq.*, and the fact that VWoA was wholly-owned by

VWAG to infer a possible agency relationship for service of process. VWAG itself noted, at page 16 of its brief in *Cipolla*, that:

> In fact, plaintiff-appellant *does not argue the point at all* except, by reason of its context, to leave the possible inference that [appointment under the Motor Vehicle Safety Act], along with the fact of VWAG's ownership of the shares of stock of VWoA constitutes a situation identical to that in *Coons v. Honda Co., Ltd. of Japan*, 176 N.J. Super. 575, 424 A.2d 446 (1980).
>
> Plaintiff-appellant's reference to the aforesaid designation and stock ownership is insufficient to establish agency and the analogy drawn to *Coons* is totally inapposite. (emphasis added).

In sum, VWAG is being less than frank with this Court to claim, as it does in its Petition, that the agency theory here at issue was argued in detail in *Cipolla* before it was rejected. In truth, the opinion of the Rhode Island Supreme Court does not even touch upon the issue and VWAG's brief before that court reveals that the plaintiff in that case did "not argue the point at all".

Finally, the analogy drawn by VWAG between rulings on the Hague Convention on Service Abroad and the Hague Evidence Convention is totally inapposite. With regard to the Evidence Convention, a clear split of authority has developed on the issue of whether the Evidence Convention must be the method of first resort in obtaining discovery from defendants in signatory nations. *Compare e.g., In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985) [and] *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986) (holding that the Hague Evidence Convention has no application to production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules) *with Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983) [and] *Pierburg GmbH & Co. v. Superior Court*, 137 Cal.App.3d 238, 186 Cal. Rptr. 876 (1982)

(requiring compliance with the Evidence Convention despite *in personam* jurisdiction over the foreign defendant).

However, as to the Service Convention, the consistency VWAG claims it seeks already exists.

Attempts to serve statutorily appointed agents with no connection to the foreign defendant (a practice reminiscent of *notification au parquet*), have been consistently rejected. *See, e.g., Hamilton v. Volkswagenwerk Aktiengesellschaft*, No. 81-01-L (D.N.H. 1981); *Richardson v. Volkswagenwerk A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982); *Low v. Bayerische Motoren Werke, A.G.*, 449 N.Y.S. 2d 733 (App. Div. 1982).

Similarly, attempts to establish agency based upon mere stock ownership or the designation under the Motor Vehicle Safety Act have been consistently quashed. *See, e.g., Richardson, supra*; *Hamilton, supra*; *Pasquale v. Genovese*, 139 Vt. 346, 428 A.2d 1186 (1981); *Utsey v. Volkswagen of North America*, No. 80-1620-9 (D.S.C. 1981); *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985).

And in every case where, as here, plaintiffs have made a factual record regarding the close connection and control between the foreign parent and its domestic subsidiary, service has been upheld. *See, e.g., Lamb v. Volkswegenwerk Aktiengesellschaft*, 104 F.R.D. 95 (S.D. Fla. 1985); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *McHugh v. International Components Corp.*, 118 Misc. 2d 489, 461 N.Y.S.2d 166 (1983); *Ex Parte Volkswagenwerk Aktiengesellschaft*, 443 So.2d 880 (Ala. 1983); *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill.App.3d 595, 495 N.E.2d 1114 (1986).

In sum, there is no conflict of authority as contemplated under Rule 17.1 of this Court. The petition should be denied.

CONCLUSION

Viewed in light of the rules of treaty interpretation enunciated by this Court, and in the context of the other cases which have arisen under the Hague Convention on Service Abroad, it is clear that the decision of the Illinois Appellate Court is correct and that the issues addressed therein do not merit review by this Court.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACK SAMUEL RING
JUDITH E. FORS

JACK SAMUEL RING & ASSOCIATES, LTD.
69 W. Washington Street
Chicago, Illinois 60602
(312) 782-5462

Attorneys for Respondent

REPLY

BRIEF

No. 86-1052

In the Supreme Court of the United States

OCTOBER TERM, 1986

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation, PETITIONER

v.

HERWIG J. SCHLUNK, as Administrator of the Estates
of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,
RESPONDENT

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY BRIEF FOR THE PETITIONER

JAMES K. TOOHEY
DAVID C. BOHRER
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000

Of Counsel:
HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, N.Y. 10005
(212) 344-0680

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONER

The principal argument advanced in the Brief in Opposition is that the Hague Service Convention is simply inapplicable to suits against a foreign defendant when service may be accomplished upon an involuntary "agent" of that defendant (as defined by state law) within the United States. Respondent supports this assertion by contending that both the "clear import" (Br. in Opp. 3) and the "prime purpose" (*id.* at 9) of the Convention compel that result. Respondent's arguments are demonstrably wrong and merely emphasize the need for this Court's review. Indeed, the decision below has precipitated a diplomatic protest from the Federal Republic of Germany, a copy of which has been appended at App., *infra*, 1a-2a.

I.

In respondent's view, this case can be resolved by resort to the "plain language of the Convention" (Br. in Opp. 4)—*i.e.*, "where there is occasion to transmit a judicial * * * document for service abroad." Article 1, Pet. App. 27a. This language, respondent contends, "stand[s] for the obvious result that the Convention applies only when service is made within the boundaries of a foreign signatory" (Br. in Opp. 3). But this approach begs the very

question of treaty interpretation at issue here: whether there is "occasion to transmit" pleadings "for service abroad" when the pleadings are served in *this* country on someone whom the adversary selects as a candidate to send them to the defendant in a *foreign* country. Respondent's simplistic construction of the Convention would substantially diminish the rights granted foreign defendants, in violation of the Supremacy Clause, and would lead to absurd results.

Here, for example, respondent does not dispute that VWAG, a West German corporation, was the real target of service. Nor does he dispute that the method of substituted service employed was premised on the assumption that the recipient of the service (VWoA) would merely transmit the pleadings to VWAG in West Germany. Thus, respondent can escape the common-sense conclusion that service on VWAG actually occurred abroad only by arguing that, *under Illinois law*, service on VWAG was deemed to have occurred *prior to* the time that the documents were transmitted overseas.

Given the background of the Hague Service Convention, this interpretation of the treaty can only be described as ridiculous. The signatory nations spent years devising procedures intended to remove the obstacles and confusion confronting defendants in multinational litigation because of the different service requirements of various countries and their political subdivisions. It is inconceivable that these nations, having drafted the Convention, would have intended to allow the important procedural rights granted foreign defendants thereunder to be defeated by parochial, unpredictable and diverse notions of "service" under state law. Rather, the words "service abroad" are part of a federal treaty and must be construed as a matter of federal law and in accord with federal policies. The rule applied by the courts below conflicts with those policies in at least two respects.

First, as respondent acknowledges (Br. in Opp. 9), the principal purpose of the Convention is to establish a system whereby foreign defendants receive *actual notice* of documents *in sufficient time to defend themselves.* This

purpose cannot be achieved if the procedures negotiated by the signatory nations to accomplish that objective may be evaded simply by serving the defendants' involuntary "agents" rather than the defendants themselves. Such agents, not having been appointed by the defendants for the purpose of receiving judicial documents on their behalf, would have no obligation to forward such documents to the intended recipients in timely fashion.

Respondent's only answer is that "VWAG received prompt notice of this action through VWoA" (Br. in Opp. 9). Even if that were true in this case, it offers no excuse for respondent's failure to comply with the federally-prescribed manner of service. Moreover, there is no assurance that prompt notice will occur in the thousands of future cases that will be governed by the interpretation of the Convention adopted by the Illinois courts and the courts of other states. Nothing in that interpretation limits involuntary "agents" to wholly-owned subsidiaries such as VWoA. Thus, if the determination of when service occurs under the Convention is to be left solely to local law, there is nothing to prohibit a state, as a matter of local law, from designating the Secretary of State, partially-owned subsidiaries, distributors, joint venturers, affiliates, or employees of a foreign defendant as its involuntary "agents" for the receipt of service. The Convention, as construed by the courts below, would suffer from precisely the same defects as the *notification au parquet* system it was intended to replace. See Pet. 24-25.

Second, respondent's construction, which makes the applicability of the Convention regime turn on when service is deemed to take place under local law, would destroy uniformity in service rules under the Convention. If each of the 50 states—and each signatory nation—could determine for itself whether service on a foreign defendant has occurred prior to transmittal of the documents abroad, and could thus render the treaty rights inapplicable simply by adopting an "involuntary agency" theory, the Convention would mean very little. Not only would each state be free to adopt a different local law standard (*e.g.*, *notification au parquet*, alter ego, mere

instrumentality, department, agent), but each judge would be free to make an *ad hoc* determination as to whether that standard had been satisfied in a particular case. It is difficult to imagine, however, that Germany, Japan, France, and our other major trading partners would have negotiated for this treaty to protect their citizens in American courts if they thought that Illinois, Florida, or Rhode Island, for example, would be at liberty to say that the Convention simply does not apply to their corporate nationals whenever process can be delivered to an "involuntary" agent. See *Air France* v. *Saks*, 470 U.S. 392, 399 (1985) ("It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").[1]

Indeed, respondent's position completely unravels once one recognizes that it depends upon the proposition that "uniformity of procedure was [not] the prime purpose of the Convention" (Br. in Opp. 9). To the contrary, both the United States and the Federal Republic of Germany have emphasized that the Convention was expressly designed to eliminate the diverse, confusing and conflicting service rules that previously applied to foreign defendants and to substitute an exclusive, uniform standard governing service of judicial documents abroad. Thus, in urging the Senate Judiciary Committee to study the problem of international service, the American Bar Association remarked:

[1] By the same token, it is inconceivable that the United States would have entered into the Convention if its citizens would have been subject to local service rules in other signatory nations. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess., App. 6-7 (1967) (the Hague Service Convention "provides a high degree of assurance that if an American citizen in the United States is sued in the courts of a state party to this treaty, he will be notified of the suit in sufficient time to enable him to defend the action."). If the Illinois Appellate Court's decision is correct, there is nothing to stop West Germany, for example, from determining, as a matter of local law, that service on an American defendant is complete upon delivery to the West German Foreign Ministry, or the United States Ambassador in Bonn, or the defendant's employee vacationing in Munich.

> With 49 separate procedural jurisdictions in the United States (48 State court systems and the Federal system) *a unitary approach is the only solution.* We can hardly expect the Government of Holland to look favorably on a program of separate negotiation with the representatives of each of the 48 States and with the representatives of the Federal Government. The problems must be solved through a single, uniform set of discussions, *the results of which will be effective for all of the 49 jurisdictions.*

S. Rep. No. 2392, 85th Cong., 2d Sess. 8 (1958) (emphasis added). A few years later, after the Convention had been drafted, the Senate Foreign Relations Committee urged ratification as "an important step toward the international codification of a *uniform law governing the service of judicial and extrajudicial documents abroad.*" S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 3 (1967) (emphasis added). The Convention clearly was intended to prescribe *"uniform procedures for the service of judicial documents abroad*; that is, in the *cases where an action is commenced by a plaintiff in one country against the defendant who is in another country."* *Id.* App. at 5-6 (emphasis added). This language demonstrates that the word "service" was meant to be not a grudging, parochial term of art, dependent upon local custom, but rather a generic description governing the transmission of *all* pleadings to defendants who are forced to appear in unfamiliar courts of other nations. And as we pointed out in the Petition (at 8-9), the Solicitor General has only recently reiterated the federal government's long-standing position that the Convention was intended to be the "exclusive" system for serving judicial documents on foreign defendants in United States courts. That position is plainly at odds with the jerry-rigged system for serving foreign defendants sanctioned by the Illinois courts.

The Federal Republic of Germany, too, is on record as strongly opposing the interpretation of the Convention adopted by the courts below. On January 22, 1987, the West German government informed the Department of State that "[t]he decision of the Appellate Court of Illi-

nois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character." App., *infra*, 1a. West Germany stated that the Illinois court's ruling "would eviscerate the Hague Service Convention and throw its signatories back to the confusion prior to its ratification" because foreign defendants

> could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Id. at 2a.

Accordingly, respondent's submission that the signatory nations to the Convention were not concerned with uniformity of service rules is flatly inconsistent with the positions of *both* the United States *and* West Germany. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of the treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation."). As a result, respondent's reading of the Convention fails to give the treaty "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." *Wright* v. *Henkel*, 190 U.S. 40, 57-58 (1903).

II.

Respondent also contends (Br. in Opp. 11-16) that the lower courts are not in conflict over the interpretation of the Convention. But respondent's strained efforts to distinguish the cases cited in the Petition serve only to emphasize how frequently this issue has arisen in state and federal courts, and how often the very same corporate entities have been treated differently from jurisdiction to jurisdiction. The inconsistent results reached in those cases demonstrate the imperative need for this Court to restore uniformity of construction to this international convention.

It is true, as respondent points out, that some of the cases cited in the petition, such as *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985), involved service on a statutorily-appointed agent, such as the Secretary of State, as well as on a subsidiary of the foreign defendant. But respondent wholly fails to explain why, if his legal theory is correct, that distinction should make the slightest difference. The Illinois Appellate Court expressly held that the Convention was inapplicable in *any* case where local law deems service to have occurred within the state (Pet. App 4a). The court then determined that a foreign defendant can be found "within the state" whenever state law designates a domestic "agent" of the foreign defendant for purposes of receiving process. This "involuntary agency" rationale was not limited to subsidiaries of foreign corporations. To the contrary, the Illinois court explained that "[i]f the Supremacy Clause permits service on agents within the forum state, despite the existence of the Hague Convention (which says nothing about locally appointed agents), *it should not matter how that agency relationship came about.*" *Id.* at 8a.

In other words, if respondent is right in contending that the Convention does not mandate uniformity and that state law determines when service is made, then there is no apparent reason why state law cannot provide that service on a foreign corporation is complete when delivered to the Secretary of State. The Secretary of State is no different from a subsidiary in practical, operational terms. He is present "within the state," may be served there (so that there is no "occasion to transmit a judicial • • • document for service abroad"), and may be required to transmit the document to the foreign defendant overseas. Yet respondent concedes (Br. in Opp. 15), as he must, that the courts have uniformly refused to allow the Convention procedures to be circumvented in this fashion. See, *e.g.*, *Harris* v. *Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775, 777 (M.D. La. 1984); *Cipolla* v. *Picard Porsche Audi, Inc.*, *supra*. The methodology employed by these courts thus plainly conflicts with the decision below.

Respondent appears to recognize (Br. in Opp. 15) that attempts to serve statutorily-appointed agents "have been consistently rejected" by the courts, but he offers no convincing explanation of why this case should lead to a contrary result—*i.e.*, why in one situation, but not the other, local law should be able to trump federal law and to deem service to have occurred within the forum state.[2] Certainly substituted "private" agency service is no less objectionable than substituted "public" agency service, given the evils that the drafters of the Convention sought to eliminate. In both instances, the imputed agent must transmit the pleadings overseas, and the foreign defendant's time to answer or otherwise protect its legal rights begins to run before it receives the judicial documents.[3] In both instances the foreign defendant receives the documents in untranslated form. See Pet. 3-4. And in both instances, the sovereign interests of the foreign signatory, which the Convention is designed to protect, are ignored. See Advisory Committee's Note of 1963 to Fed. R. Civ. P. 4(i), reprinted in 2 *Moore's Federal Practice* ¶ 4.01[25] at 4-35 (1986) (service abroad may be considered by a foreign country to involve performance of judicial, and therefore sovereign, acts).

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[2] Respondent tries to distinguish *Cipolla* on the ground that the Secretary of State *mailed* the summons and complaint to the defendant in West Germany and that "this method of service is in clear conflict with West Germany's objections to service by mail under the terms of the Hague Service Convention" (Br. in Opp. 13). Respondent cannot keep his legal theory straight. Under the Illinois Appellate Court's rationale, service in *Cipolla* occurred when the documents were delivered to the Secretary of State in Providence, not when the Secretary of State mailed them to the foreign defendant in West Germany, and thus "the terms of the Hague Service Convention" should have been irrelevant. Moreover, how else other than by mail does respondent expect substituted service upon a domestic subsidiary to reach the defendant abroad?

[3] Contrary to respondent's intimation (Br. in Opp. 15), there is no reason to assume that transmittal of documents overseas is any less reliable when performed by the Secretary of State than when performed by the odd assortment of "ad hoc" agents sanctioned by the decision below. See Pet. 26-27 & n.19.

III.

Respondent offers a number of additional points that should not go unanswered. First, respondent asserts three times (Br. in Opp. 2, 3 n.1, 7)—albeit without supporting citation—that VWAG conceded below that service on VWoA would have been proper if it had been labeled a a "mere instrumentality." Respondent is plainly wrong. VWAG argued in the Supreme Court of Illinois, as it has here, that the Hague Service Convention is the exclusive method of serving a foreign corporation and that state law cannot alter the treaty. In the alternative, VWAG argued that, even if Illinois' common law "alter ego" doctrine were to be applied, service here would still be improper because the two entities are not alter egos. Those arguments do not embody any concessions.

In addition, respondent offers an anecdote (Br. in Opp. 8) concerning the difficulty one plaintiff purportedly faced in resorting to the Convention procedures. The relevance of this anecdote is not apparent, because the instant case raises no question regarding the consequences that follow from a foreign government's refusal to make service under the Convention. What *is* relevant here is that respondent never made any attempt to utilize the Convention procedures, even though he has failed to suggest any reason why those procedures would have been inadequate in his case.

Respondent contends (Br. in Opp. 8) that it makes little difference whether a document is translated into the defendant's language. The short answer is that the drafters of the Convention thought otherwise, and the United States deemed otherwise in ratifying the Convention and creating this federal obligation. Respondent's position simply ignores the plight of a multinational company, which would be confronted with numerous pleadings, pouring in through various sources in unpredictable fashion, and written in various foreign languages. It would be impossible to develop an effective litigation supervision system absent the uniform protections of the Convention.

Respondent includes (Br. in Opp. 9) an emotional appeal to the "tremendous profits reaped by a company such as VWAG" and the need to "subject[] it to the laws of each jurisdiction with which it has sufficient contacts for purposes of *in personam* jurisdiction • • •." This Court should not be misled concerning what is at issue here: VWAG has never contended in this case that it may not be subjected to the jurisdiction of the Illinois courts if properly served. All that VWAG contends is that it is entitled to the procedural rights the United States promised to accord foreign defendants when it entered into the Hague Service Covention, as a matter of both federal and international law. See Pet. 21.

IV.

In sum, nothing in the Brief in Opposition rebuts the reasons given in the Petition why this case warrants further review. It raises an important, recurring issue of federal treaty interpretation on which the lower courts are hopelessly divided. It raises an issue that is of concern to nearly every foreign company that does business in the United States through a subsidiary or other putative "agent." And it raises an issue that directly affects relations between this country and its major trading partners, as evidenced by the diplomatic protest recently lodged by the Federal Republic of Germany.[4]

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[4] This Court has emphasized that, in interpreting treaties, "we 'find the opinions of our sister signatories to be entitled to considerable weight.'" *Air France* v. *Saks*, 470 U.S. at 404.

Respectfully submitted.

JAMES K. TOOHEY
DAVID C. BOHRER
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000

Of Counsel:
HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, N.Y. 10005
(212) 344-0680

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

FEBRUARY 1987

APPENDIX

APPENDIX

EMBASSY
OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to bring to the Department's attention a court decision which is likely to have serious adverse effects on international litigation in civil and commercial matters.

In in re Herwig J. Schlunk as Administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, vs Volkswagen AG, the Appellate Court of Illinois, applying Illinois law, held that plaintiff need not comply with the provisions of the Hague Convention on service abroad of judicial and extrajudicial documents in civil or commercial matters when serving a summons and complaint on the German Volkswagen AG, but that it was sufficient to serve those documents on Volkswagen America, Inc., a subsidiary of Volkswagen AG organized under the Laws of New Jersey, which was characterized in the decision as an involuntary agent of Volkswagen AG.

Volkswagen AG has filed a petition for a writ of certiori challenging the Illinois Appellate Court's decision.

Other courts have recently come to similar conclusions and have put into question an established practice of service under the Convention confirmed by both federal and state courts throughout the years. Therefore, the Federal Republic of Germany attaches great importance to the Illinois Appellate Court's decision being reviewed by the Supreme Court of the United States.

The decision of the Appellate Court of Illinois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character.

Serving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time"

and, if the receiving contracting State so requires, in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles. Such a practice rather produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude by the provisions of Article 15 and 16 of the Convention.

Furthermore, letting stand the Illinois Court's decision based upon a doubtful involuntary agent rationale, would mean that foreign defendants, whether corporations located in or private persons residing in a contracting State, could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Such a development would eviscerate the Hague Service Convention and throw its signatories back to the confusion existing prior to its ratification.

It would be contrary to the intentions of the framers of the Convention who meant to put an end to that state of confusion by agreeing on mandatory unified procedures of notification and would lead to inproductive and costly litigation for both American plaintiffs and foreign defendants.

The Embassy would very much appreciate it if the Department were to convey the German position to the Supreme Court of the United States and to join in to defend an international convention which has proved to be beneficial to all of its signatory nations.

Washington, D.C., January 22, 1987

Department of State
Washington, D.C.

AMICUS CURIAE

BRIEF

No. 86-1052

In the Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

HERWIG J. SCHLUNK, ADMINISTRATOR OF THE ESTATES OF FRANZ J. SCHLUNK AND SYLVIA SCHLUNK, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

DAVID EPSTEIN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Hague Service Convention prohibits a United States plaintiff from serving a summons and complaint upon a foreign-based corporation through domestic delivery of the documents to its wholly owned and closely controlled United States subsidiary, which has been deemed under state law to be the foreign corporation's agent for service of process.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Volkswagenwerk Aktiengesellschaft (VWAG) is a corporation organized under the laws of the Federal Republic of Germany. It seeks review of a decision from the Appellate Court of Illinois affirming a trial court's denial of VWAG's motion to quash service of respondent's complaint. VWAG contends that respondent must serve his complaint in accordance with the procedures specified in the Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (Hague Service Convention). Respondent maintains that he properly served VWAG through in-state service on Volkswagen of America, Inc. (VWoA), VWAG's wholly owned domestic subsidiary and "involuntary agent" under Illinois law.

1. The Hague Service Convention is a multinational agreement, formulated through the Hague Conference on

Private International Law, that prescribes methods for transmitting judicial and extrajudicial documents for service abroad.[1] The Convention, which is expressed in equally authoritative English and French versions (20 U.S.T. 361-373), seeks "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time" and, more generally, "to improve the organization of mutual judicial assistance" (20 U.S.T. 362 (preamble)). It has been ratified by the United States (in 1967) and by Germany (in 1979), and ratified or acceded to by 30 other countries. See Pet. App. 27a, 45a.[2]

Article 1 provides that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (20 U.S.T. 362). Articles 2 through 16 set forth procedures for service of judicial documents abroad. Basically, each member nation must designate a "Central Authority" that shall "receive requests for service coming from other contracting States" (art. 2, 20

[1] See generally Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1983); 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)* 118-173 (1984 & Supp. 1986). The Hague Conference also formulated the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (Hague Evidence Convention). The Hague Evidence Convention, the proper construction of which was involved in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987), provides optional methods for litigants to gather evidence from foreign nationals of member countries.

[2] Besides the United States and Germany, the following countries are parties to the Convention: Antigua and Barbuda; Barbados; Belgium; Botswana; Cyprus; Czechoslovakia; Denmark; Egypt; Fiji; Finland; France; Greece; Israel; Italy; Japan; Kiribati; Luxembourg; Malawi; the Netherlands; Nevis; Norway; Portugal; Seychelles; Spain; St. Kitts; St. Lucia; St. Vincent; Sweden; Turkey; and the United Kingdom.

U.S.T. 362). The Central Authority, upon ascertaining that a request complies with the Convention's standard format and requirements (arts. 3-4, 20 U.S.T. 362), must arrange for service of the document through a method prescribed by the receiving nation's internal law or through a method designated by the requester and compatible with that law (art. 5, 20 U.S.T. 362-363). The Central Authority may require that the document be translated into the language of the receiving nation (*ibid.*).

Upon completion of service, the Central Authority must provide a certificate to the requester indicating the method, place and date of service (art. 6, 20 U.S.T. 363). If the Central Authority is unable to serve the document, it must specify the circumstances that have prevented service (*ibid.*). The Convention generally recognizes the validity of other service methods so long as the receiving nation does not object (arts. 8-11, 20 U.S.T. 363-364). It provides, however, that a receiving nation may refuse a request for service that complies with the terms of the Convention "only if it deems that compliance would infringe its sovereignty or security" (art. 13, 20 U.S.T. 364).

The Convention also includes provisions governing the entry of and relief from default judgments where "a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service * * * and the defendant has not appeared" (arts. 15-16, 20 U.S.T. 364-365). Other articles contain provisions governing service of "extrajudicial documents" (art. 17, 20 U.S.T. 365) and a number of "general clauses" (arts. 18-31, 20 U.S.T. 365-367). The Convention does not, in any manner, confer jurisdiction; it is concerned solely with providing methods for serving documents abroad.[3]

[3] In fiscal year 1986, the United States Central Authority (the Department of Justice's Office of Foreign Litigation) received 5,033 incoming requests for service on American citizens. We are unable to estimate the number of American requests transmitted abroad because outgoing requests are not transmitted through the United States Central Authority. But we do believe that the number is substantial.

2. Respondent filed a wrongful death action in the Circuit Court of Cook County on behalf of his deceased parents, Franz and Sylvia Schlunk, against Dennis Reed and VWoA, arising from a 1983 automobile accident (Pet. App. 2a; R. 2-25). Respondent alleged that Reed's negligence precipitated a head-on collision in Cook County between Reed's automobile and the Schlunks' 1978 Volkswagen "Rabbit" (R. 2-9). He further alleged that VWoA had designed and sold a defective automobile that caused or contributed to his parents' deaths (R. 9-25).

Respondent served the summons and complaint on Reed directly and on VWoA through delivery to C.T. Corporation, VWoA's registered agent for receipt of process in Illinois (Pet. App. 2a).[4] Reed failed to appear and an order of default was entered against him (*ibid.*). VWoA filed a timely answer that, among other matters, denied designing or assembling the Schlunks' automobile (R. 28-31). Respondent then filed an amended complaint asserting his defective design claims against both VWAG and VWoA (R. 42-87).

Respondent attempted to serve VWAG through delivery of a summons and amended complaint to VWoA's registered agent, C.T. Corporation, which refused acceptance on the ground that it "is not the Statutory/Registered Agent in Illinois" for VWAG (R. 88). Respondent then attempted to serve VWAG by providing C.T. Corporation with an "alias summons" addressed to VWoA "as Agent *for*" VWAG (R. 93-95). VWAG, at

[4] Illinois law permits service on individuals by delivery of a copy of the summons to the individual or to a family member at the individual's usual place of abode. Ill. Ann. Stat. ch. 110, para. 2-203 (Smith-Hurd 1983). Illinois law further provides that a "private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law." Ill. Ann. Stat. ch. 110, para. 2-204 (Smith-Hurd 1983 & Supp. 1987); see also *id.* ch. 32, para. 5.25 (Smith-Hurd Supp. 1987).

this juncture, entered a special appearance in the circuit court for the limited purpose of quashing service of process (R. 96-102). VWAG did not dispute that, upon proper service, it was subject to the personal jurisdiction of the Illinois courts. It maintained, however, that the court's jurisdiction could be perfected only through service in accordance with the Hague Service Convention (R. 158-169).

The circuit court denied VWAG's motion to quash service (Pet. App. 24a-26a). The court first determined that, under principles of Illinois common law, VWAG and VWoA "are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent" (*id.* at 25a). The court then concluded that "service of process upon VWoA as agent of VWAG is effective service of process upon VWAG under the Illinois Supreme Court Rules and Illinois Code of Civil Procedure" and "is not in conflict with" the Hague Service Convention because that Convention "is applicable only to service of process outside of the United States" (*ibid.*). Upon VWAG's application, the circuit court authorized interlocutory appeal of its decision (*id.* at 25a-26a).

The Appellate Court of Illinois affirmed (Pet. App. 1a-20a). The court first rejected VWAG's contention that the Hague Service Convention provides the exclusive method for service on residents of member nations. The court observed that the Convention, by its express terms, "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362). It concluded that the Convention was inapplicable here, stating (Pet. App. 4a):

> Under Illinois law, if the target for service can be found within the state there is simply no occasion for service abroad. Since there is no occasion for service abroad in this case, the Hague Convention, by its own terms, does not apply.

The court found support for its decision in a number of federal and state court decisions[5] and in Article 10 of the Convention (20 U.S.T. 363), which permits the "State of destination" to specify the method of service within its borders (Pet. App. 5a-6a). The court distinguished two state court cases[6] that had reached a contrary result (*id.* at 6a-7a). It specifically rejected VWAG's contention that the Hague Service Convention is designed to achieve a uniform method of service, stating that "[i]t is unclear why foreign nationals should be allowed greater protection than United States citizens" from local service rules (*id.* at 7a-8a). The court expressed the added view that VWAG had "conceded away this preemption argument" by acknowledging that foreign nationals can voluntarily appoint domestic agents for receipt of service in this country (*ibid.*).

The appellate court then examined "whether serving VWoA as agent for VWAG was good service" under Illinois law (Pet. App. 8a). The court conducted an extensive inquiry into the state law principles governing involuntary agency relationships (*id.* at 8a-17a) and concluded that VWAG was properly served through service upon VWoA (*id.* at 17a). It stated that "the relationship between VWAG and VWoA is so close that it is certain that VWAG 'was fully apprised of the pendency of the suit' by delivery of the summons to VWoA" (*ibid.*, quoting *Maunder* v. *DeHavilland Aircraft of Canada, Ltd.*, 102 Ill. 2d 342, 353, 466 N.E.2d 217, 223, cert. denied, 469 U.S. 1036 (1984)). The court rejected VWAG's various state law contentions as well as VWAG's claim that failure to quash service would prejudice its right to remove the action to federal court (Pet. App. 18a-20a).

[5] *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); *Zisman* v. *Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Lamb* v. *Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985); *McHugh* v. *International Components Corp.*, 118 Misc. 2d 489, 461 N.Y.S. 2d 166 (Sup. Ct. 1983).

[6] *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985); *Law* v. *Bayerische Motoren Werke, A.G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (App. Div. 1982).

The Illinois Supreme Court denied VWAG's petition for leave to appeal (Pet. App. 21a) but stayed the mandate pending VWAG's petition to this Court (*id.* at 22a-23a).[7]

DISCUSSION

VWAG asks this Court to decide whether the Hague Service Convention precludes a United States plaintiff from serving a summons and complaint upon a foreign-based corporation through domestic delivery of the documents to an entity—in this case, a wholly owned and closely controlled domestic subsidiary—considered under state law to be the foreign corporation's "involuntary" agent. We submit that the Court should grant VWAG's petition because it presents an important question concerning the relationship between the Hague Service Convention and other domestic laws governing service of process and there is substantial disagreement on the issue among the lower courts.[8]

[7] The judgment of the Appellate Court of Illinois, to the extent that it rejects VWAG's claim that the Hague Service Convention specifies the exclusive method for serving foreign nationals, is reviewable by writ of certiorari under 28 U.S.C. 1257(3). The decision resolves a federal treaty question, it was rendered by the highest court of a State in which a decision could be had (see, *e.g.*, *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 678 n.1 (1968)), and the decision is final under the standards set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Under Illinois law, a party that, through special appearance, unsuccessfully challenges the adequacy of service of process waives that objection by taking part in further proceedings in the case. Ill. Ann. Stat. ch. 110, para. 2-301(c) and joint committee comments (1955) (Smith-Hurd 1983). See, *e.g.*, *Widicus* v. *Southwestern Electric Cooperative, Inc.*, 26 Ill. App. 2d 102, 110, 167 N.E.2d 799, 804 (1960). Thus, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.*, 420 U.S. at 481.

[8] For convenience, we shall refer to business entities organized under the laws of a foreign nation as "foreign corporations." We shall refer to foreign corporations and domestic "out-of-state" corporations collectively as "nonresident corporations."

1. The question presented here is plainly important to both foreign and domestic litigants. Under this Nation's law, service of process is necessary to provide notice of a pending legal action and to secure the court's in personam jurisdiction.[9] Once a plaintiff has properly served process upon a defendant subject to the court's jurisdiction, the court may exercise substantial powers in adjudicating a claim. For example, the court may require the defendant to appear and produce evidence, and may impose sanctions for failure to comply with the court's orders.[10]

Foreign and domestic litigants (as well as their respective governments) have a significant interest in ascertaining whether a foreign corporation may be served through in-state delivery of a summons and complaint to the corporation's domestic subsidiary.[11] This question, in our view, is of widespread and recurring importance. As VWAG explains (Pet. 10, 16 n.9), foreign manufacturers commonly maintain domestic subsidiaries and affiliates that market their products in this country. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1987*, at 780-781 (107th ed. 1986). And many of these manufacturers,

[9] 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 4.02 (2d ed. 1986) [hereinafter *Moore's Federal Practice*]; 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1063, at 204 (1969) [hereinafter *Federal Practice and Procedure*]; R. Bowers, *Civil Process and Its Service* § 1 (1927); see, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Milliken* v. *Meyer*, 311 U.S. 457, 462-463 (1940); *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

[10] See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987); *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Societe Internationale pour Participations Industrielles et Commerciales S.A.* v. *Rogers*, 357 U.S. 197 (1958).

[11] The governments of France, Germany, Great Britain, and Japan have transmitted diplomatic notes suggesting that review by this Court would be appropriate. We have reprinted the diplomatic notes as Addenda to this brief.

such as VWAG, are frequently subject to product liability actions arising from the sale and use of their products. Indeed, VWAG itself has repeatedly encountered the general question presented in this case.[12]

2. The question presented here is not only important, it has generated substantial disagreement among the lower courts. As this Court has long recognized, the States have broad authority, within due process limits, to formulate rules governing service of process.[13] They commonly permit service on nonresident corporations subject to their jurisdiction through one or more of three standard methods: (1) direct service upon an in-state agent that has been designated by the corporation;[14] (2) direct service, through personal or postal delivery, to the nonresident corporation at its out-of-

[12] See, *e.g.*, *Wingert* v. *Volkswagenwerk A.G.*, No. 3:86-2994-16 (D.S.C. May 19, 1987); *Lamb* v. *Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985); *Richardson* v. *Volkswagenwerk, A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982); *Utsey* v. *Volkswagen of North America*, No. 80-1620-9 (D.S.C. Sept. 18, 1981); *Hamilton* v. *Volkswagenwerk A.G.*, No. 81-01-L (D.N.H. June 10, 1981); *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985); *Ex parte Volkswagenwerk A.G.*, 443 So. 2d 880 (Ala. 1983); *Dr. Ing. H.C.F. Porsche* v. *Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981).

[13] See, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-313 (1950); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945); *Adam* v. *Saenger*, 303 U.S. 59, 67 (1938); *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1877). Indeed, the federal courts generally recognize and employ state rules governing service of process upon individuals and corporations. See Fed. R. Civ. P. 4(c)(2)(C)(i).

[14] Most States require a nonresident corporation, as a condition of doing business within the State, to obtain a certificate of authority and to appoint a registered agent for receipt of service of process. See Model Business Corp. Act Ann. 2d §§ 106-115 (1971 & Supp. 1977). See also, *e.g.*, Cal. Corp. Code § 2110 (West 1977); Ill. Ann. Stat. ch. 32, para. 5.25 (Smith-Hurd Supp. 1987); Minn. Stat. Ann. § 303.13.1(1) (1985 & Supp. 1987); Tex. Rev. Civ. Stat. art. 342-1004 (Vernon Supp. 1987); Va. Code Ann. § 8.01-301(1) (1984).

state address;[15] and (3) indirect service through a state official (such as the State's secretary of state) or other imputed agent (such as an in-state subsidiary, or an officer of the foreign corporation found within the State) who is charged with responsibility for transmitting process to the foreign corporation.[16]

There appears to be no serious doubt that the Hague Service Convention leaves the first method of service intact; the Convention does not diminish a State's sovereign authority to condition a foreign corporation's right to transact business within the State's borders upon designation of an in-state agent for service of process.[17] And it seems equally clear that the Conven-

[15] See Uniform Interstate and International Procedure Act § 2.01(a) (1962); Fed. Rule Civ. P. 4(i). See also, *e.g.*, Ala. R. Civ. P. 4.2; Haw. Rev. Stat. § 634-24 (1985); N.Y. Bus. Corp. Code § 307(a)(2) (McKinney 1986); Ohio Civ. R. 4.5(A).

[16] States commonly provide that a plaintiff may serve the secretary of state if the nonresident corporation transacting business within the State has failed to maintain a registered agent within the State. See Model Business Corp. Act Ann. 2d § 115 (1971 & Supp. 1977). See, *e.g.*, Cal. Corp. Code § 2111 (West 1977); Ga. Code Ann. § 14-2-319 (1982). Other States permit service upon the secretary of state even if the corporation is not required to maintain a registered agent. See, *e.g.*, Ark. Stat. Ann. § 27-339.1 (1979 & Supp. 1985); Minn. Stat. Ann. § 303.13.1(3) (West 1985 & Supp. 1987); Miss. Code Ann. § 13-3-57 (Supp. 1986); N.Y. Bus. Corp. Code § 307 (McKinney 1986); Va. Code Ann. §§ 8.01-301(3), 8.01-329 (1984). And other States permit service, in addition, upon any corporate officer or agent found within the State. See, *e.g.*, Ill. Stat. Ann. ch. 110, para. 2-204 (1983 & Supp. 1987); La. Rev. Stat. Ann. § 13-3471 (West 1967). See generally 2 *Moore's Federal Practice* ¶ 4.41-1[6]. These rules address the special problems that arise in serving corporate entities.

[17] The federal government frequently requires foreign corporations to designate an agent for service of process with respect to various regulatory programs. See, *e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, § 110(e), 15 U.S.C. 1399(e); Trademark Act of 1946, § 1(d), 15 U.S.C. 1051(d); 17 C.F.R. 3.30, 15.05 (Commodity Futures Trading Commission regulations); 17 C.F.R. 230.262, 240.15b1-5, 275.0-2 (Securities and Exchange Commission regulations). There is nothing in the Convention that would pro-

tion places major restrictions on the second method of service. As we shall explain below, the Convention sets forth generally applicable—and, we believe, generally mandatory—procedures for serving a judicial summons and complaint within another member nation's borders. The Conventions' effect on the third method of service, however, is the subject of considerable debate. The courts have not reached a consensus on whether a State may permit service upon a foreign corporation—which might have no more than "minimum contacts" with the State (*International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945))—through in-state service upon a person or entity considered under state law to be the foreign corporation's "involuntary agent."

The Rhode Island Supreme Court has ruled that the Hague Service Convention generally precludes in-state service upon involuntary agents. *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (1985). In that case, a plaintiff who alleged personal injury resulting from a defective Volkswagen "Rabbit" attempted to serve VWAG through imputed agency principles—first, by delivery of the summons and complaint to the Rhode Island Secretary of State; and, later, by delivery through certified mail to VWoA (*id.* at 131).[18] The trial court determined that the service was ineffective and the plaintiff appealed. The Rhode Island Supreme Court passed over potential state law objections[19] and concluded that

hibit the States from imposing similar requirements. Indeed, VWAG does not contend otherwise. See Pet. App. 8a.

[18] Rhode Island law provides that whenever a foreign corporation authorized to transact business in the State fails to appoint a registered agent for in-state service of process, the Rhode Island Secretary of State shall act as the corporation's agent. R.I. Gen. Laws § 7-1.1-108 (1985); see also R.I. R. Civ. P. 4(d)(3). Rhode Island law also permits a plaintiff to serve a foreign corporation by mailing a copy of the summons and complaint by certified mail to the corporation's designated agent for service of process. R.I. R. Civ. P. 4(e)(2).

[19] The court noted that "nothing in the record * * * would support the view that VWAG was ever authorized to do business in

the Hague Service Convention in any event preempted the local law. The court stated that the Hague Service Convention "applies in all cases concerning civil or commercial matters wherein documents are transmitted abroad between those in signatory countries" (*ibid.*). Citing the Supremacy Clause (U.S. Const. Art. VI), the court ruled that "in this controversy, service on VWAG must be perfected according to the terms of the Hague Convention even though Rhode Island's statutes and rules may provide several other methods for effectuating the service of process" (496 A.2d at 132).

Faced with similar facts, the Alabama Supreme Court, like the Illinois court in the instant case, reached a contrary result. *Ex parte Volkswagenwerk A.G.*, 443 So. 2d 880 (1983). The plaintiff in that case alleged that defects in a Volkswagen van caused the wrongful death of his son. The plaintiff first attempted, unsuccessfully, to serve VWAG by mailing the summons and complaint to VWAG's headquarters in Germany (*id.* at 882).[20] He then attempted service, under imputed agency principles, through delivery of process by certified mail to VWoA (*ibid.*). The trial court refused to quash service and VWAG petitioned for a writ of mandamus. The Alabama Supreme Court agreed with the plaintiff that "the Hague Convention's provisions are inapplicable in this case, since VWoA is the alter ego, and therefore the agent, of VWAG in the United States for the purpose of service of process" (*id.* at 881; see *id.* at 882-883).[21]

Rhode Island" (496 A.2d at 131 n.1). Furthermore, it appears from the record in the present case that VWAG has never designated VWoA as its general agent for service of process (Pet. App. 25a). Thus, the plaintiff's attempted service in *Cipolla* may have been invalid under Rhode Island law. See note 18, *supra*.

[20] Alabama law permits service through delivery by certified mail upon any out-of-state defendant possessing certain "sufficient contacts" with the State. Ala. R. Civ. P. 4.2. See Ala. Code § 6-4-20 (Supp. 1986) (providing that service of process shall be made in accordance with the Alabama Rules of Civil Procedure).

[21] The Appellate Court of Illinois reached essentially the same result in the instant case, but it applied a different state law standard in finding an agency relationship. The Illinois court,

We believe that the decision of the Rhode Island Supreme Court cannot easily be reconciled with the ruling of the Alabama Supreme Court or the Illinois court in the instant case. Rhode Island requires that litigants in that State must use the Hague Service Convention when serving foreign defendants of member countries, while Alabama (like Illinois) permits in-state service, under imputed agency principles, on those same defendants. The resulting conflict warrants this Court's review. See Sup. Ct. R. 17.1(b).[22]

The question presented here has not only produced a conflict between two state courts of last resort, it has also generated considerable disarray among the lower courts generally. For example, many courts agree with the Rhode Island Supreme Court insofar as it holds that the Hague Service Convention forbids service upon a foreign corporation through in-state service on a state

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while noting that "courts in other jurisdictions have looked to whether a subsidiary is an alter-ego or mere department of its parent," concluded that it was not necessary under Illinois law "that the relationship go so far" (Pet. App. 20a).

[22] Respondent's attempt to distinguish *Cipolla* from the Alabama and Illinois cases (Br. in Opp. 13-14) is, in our view, unpersuasive. *Cipolla* cannot be distinguished on the ground that it merely involved service through the secretary of state, since the plaintiff in *Cipolla* also attempted service through VWAG's wholly owned subsidiary, VWoA. See 490 A.2d at 131. Respondent asserts that the "involuntary agency" theory rejected in *Cipolla*—which was based on the fact that VWAG owns all of VWoA's stock and had designated VWoA as its "agent" for purposes of a federal statute (Br. in Opp. 13-14)—differs in some way from the "involuntary agency" theory accepted by the Alabama and Illinois courts. But the Rhode Island decision broadly holds that the Hague Service Convention preempts state service rules; it contains no suggestion that in-state service would have been permissible if the plaintiff had provided more formidable proof of an agency relationship. Indeed, the Rhode Island court's willingness to reach the preemption issue, notwithstanding possible state law defects in the service of process (see page 11 & note 19, *supra*) buttresses that conclusion. The Rhode Island Supreme Court could conceivably revisit the issue, but as a practical matter, the court appears to have ruled decisively on the federal question.

official designated by statute as the corporation's agent.[23] But the courts have reached divergent conclusions, with little accompanying explanation, when service is attempted upon a domestic subsidiary as the corporation's agent.[24] This confusion on a fundamental procedural

[23] The courts have offered various rationales for this result. Some courts state that the Hague Service Convention broadly preempts application of state service rules to foreign nationals. See *Mommsen* v. *Toro Co.*, 108 F.R.D. 444, 445 (S.D. Iowa 1985) (holding that the defendant "is a corporate citizen of Japan and must be served in compliance with the Hague Convention."). Others courts reason that the Hague Service Convention creates "a unitary approach to the service of process upon parties in foreign countries" (*Hamilton* v. *Volkswagenwerk A.G.*, No. 81-01-L (D.N.H. June 10, 1981), slip op. 3-4) or that it determines "how service is to be made in a foreign country" (*Harris* v. *Browning-Ferris Indust. Chemical Services, Inc.*, 100 F.R.D. 775, 777 (M.D. La. 1984)). And other courts have concluded that the Convention preempts specific elements of the state service procedure that conflict with the Convention and therefore invalidates the service. See *Low* v. *Bayerische Motoren Werke, A.G.*, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 734-735 (App. Div. 1982) (holding that the state law requirement that the plaintiff, upon serving the secretary of state, must mail a copy of the summons to the foreign corporation conflicts with the Convention).

[24] Some courts have allowed local service upon a foreign corporation's domestic subsidiary upon satisfaction of traditional principles for imputing agency. See, *e.g.*, *Lamb* v. *Volkswagenwerk A.G.*, 104 F.R.D. 95, 97 (S.D. Fla. 1985) (The Convention "is inapplicable in determining the validity of service of process under a common law agency theory when the foreign corporation or its agent is located and served within the United States."); accord *Zisman* v. *Sieger*, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985); *McHugh* v. *International Components Corp.*, 118 Misc. 2d 489, 491-492, 461 N.Y.S.2d 166, 167-168 (Sup. Ct. 1983). Other courts have rejected such service on the state law ground that the plaintiff failed to show a sufficiently close relationship between the parent and the subsidiary to support the imputed agency. See, *e.g.*, *Richardson* v. *Volkswagenwerk, A.G.*, 552 F. Supp. 73, 79 (W.D. Mo. 1982); *Utsey* v. *Volkswagen of North America*, No. 80-1620-9 (D.S.C. Sept. 18, 1981), slip op. 5-6; *Hamilton* v. *Volkswagenwerk A.G.*, No. 81-01-L (D.N.H. June 10, 1981), slip op. 5-7. And some courts (in addition to the Rhode Island Supreme Court) have held that the Hague Convention generally preempts other service methods, including service upon a domestic subsidiary. See *Brown* v. *Bellaplast Maschinenbau*, 104 F.R.D. 585, 586 (E.D. Pa. 1985) ("any attempted service which does not conform to the service requirements of the Hague Convention must be quashed" (footnote omitted)); *Wingert* v. *Volkswagenwerk A.G.*, No. 3:86-2994-16 (D.S.C. May 19, 1987), slip op. 3 ("adherence to the uniform procedures for service under the Hague Convention is preferable to an *ad hoc* evaluation of the relationship between VWAG and VWoA").

question has resulted in uncertainty and resulting hardships for foreign and domestic litigants.

Moreover, the ability of the federal and state appellate courts to resolve this uncertainty is hampered by the fact that trial court decisions on the question are often unappealable. Orders granting or denying motions to quash curably defective service of process are generally interlocutory and, absent certification to the court of appeals (see page 5, *supra*), are not subject to immediate appeal.[25] Thus, litigants are forced to make crucial initial decisions in commencing and defending lawsuits without clear guidance on the controlling standards for service of process. And trial courts must consume substantial resources adjudicating these preliminary issues on a case-by-case basis. Now that the question has

[25] See *Karl Schermer & Co.* v. *Alpha International*, No. 87-150, petition for cert. pending (filed July 24, 1987). See also, *e.g.*, *Grabner* v. *Willys Motors, Inc.*, 282 F.2d 644, 646 (9th Cir. 1960); see generally 28 *Federal Procedure L. Ed.* § 65:221 (T. Goger ed. 1984); cf. *Boreri* v. *Fiat S.P.A.*, 763 F.2d 17 (1st Cir. 1985) (refusing to review, through mandamus, a foreign corporation's claim that the Hague Evidence Convention preempts local discovery procedures). If a court grants a motion to quash service, the plaintiff may well elect to follow the Convention's procedures rather than pursue a costly appeal. See, *e.g.*, *Brown* v. *Bellaplast Maschinenbau*, 104 F.R.D. 585, 586 (E.D. Pa. 1985); see also *Hastings* v. *Graphic Systems Div. of Int'l Corp.*, No. 86-2556-S (D. Kan. Mar. 27, 1987). And if the court denies the motion, a defendant who receives actual notice may be precluded from challenging defects in the service on appeal. See, *e.g.*, *Harris Corp.* v. *National Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); see also 28 *Federal Procedure L. Ed.*, *supra*, § 65:225.

been squarely presented to this Court, we believe that the Court should take the opportunity to decide it.

3. On the merits, we have always taken the view that the Hague Service Convention's procedures, when they apply, are generally mandatory and exclusive.[26] Thus, we recently observed that "United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures." Brief for the United States as Amicus Curiae at 5 in *Volkswagenwerk A.G.* v. *Falzon*, No. 82-1888 (citing cases). This Court recently made the same point in dictum when discussing the Hague Evidence Convention, comparing the Service Convention's use of "mandatory language" in its first article. *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987), slip op. 11 n.15.[27]

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[26] See Brief for the United States as Amicus Curiae at 9 in *Anschuetz & Co., GmbH* v. *Mississippi River Bridge Auth.*, No. 85-98; Brief for the United States as Amicus Curiae at 7 in *Club Mediterranee, S.A.* v. *Dorin*, No. 83-461; Brief for the United States as Amicus Curiae at 5 in *Volkswagenwerk A.G.* v. *Falzon*, No. 82-1888.

[27] Accord, *e.g.*, 1 B. Ristau, *supra*, at 131. The general rule that the Service Convention's procedures are mandatory when service takes place within another nation's borders is, however, subject to several exceptions. For example, a court retains its inherent power, regardless of particularized service requirements, to provide effective emergency relief. See art. 15, 20 U.S.T. 364 (recognizing that "the judge may order, in case of urgency, any provisional or protective measures"). The Convention's text and ratification history also indicate that the Convention does not prescribe mandatory means for a government administrative agency to serve its summonses and other process. See art. 17, 20 U.S.T. 365 (providing for the permissive use of the Convention in the case of extrajudicial documents); see also S. Exec. Rep. 6, 90th Cong., 1st Sess. 2, 14 (1967); S. Treaty Doc. C, 90th Cong., 1st Sess. 6 (1967). Alternative service methods may likewise be permissible if a foreign government neglects to fulfill its service obligations under the Convention. Cf. *Societe Nationale Industrielle Aerospatiale*, slip op. 20 (Blackmun, J., concurring in part and dissenting in part).

The Hague Service Convention procedures are mandatory and exclusive, however, only when the Convention is applicable. The Convention states that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362). The Appellate Court of Illinois held that there is "no occasion for service abroad" in this case because "the target for service can be found within the state" (Pet. App. 4a). We have not had the opportunity to address the correctness of that reasoning in our previous filings in this Court. Although we think that reasonable arguments can be made on both sides of the question, we have concluded that the appellate court's decision is essentially correct. Settled principles of treaty construction lead us to that conclusion.[28]

The Hague Service Convention's stated objective is "to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time" (preamble, 20 U.S.T. 362 (emphasis added)). As this statement indicates, the Convention seeks to establish internationally acceptable methods for serving the judi-

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[28] "In interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations,' *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), to which '[g]eneral rules of construction apply.' *Id.*, at 262. See *Ware* v. *Hylton*, 3 Dall. 199, 240-241 (1796) (opinion of Chase, J.). We therefore begin 'with the text of the treaty and the context in which the written words are used.' *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). The treaty's history, '"the negotiations, and the practical construction adopted by the parties"' may also be relevant. *Id.*, at 396 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943))." *Societe Nationale Industrielle Aerospatiale*, slip op. 10-11. Furthermore, "'[t]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'" (*id.* at 12 n.19 (citations omitted)).

cial documents of one nation within another nation's borders. Its focus is on the transnational character of service, and not on the nationality or residency of the person to be served.

The Convention facilitates the transnational service of process, but it does not prohibit a member nation from specifying how process originating from its own courts may be served within its own borders. Quite to the contrary, the Convention places no limitations on a sovereign nation's power to prescribe the appropriate methods for wholly domestic service. The Convention's ratification history reveals a clear understanding that the Convention would not work any major change in federal or state law in this respect.[29] There is no indication whatsoever that the Executive or Legislative branches intended that the Convention would broadly preempt long-established federal and state laws governing permissible methods for wholly domestic service.[30]

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[29] See, *e.g.*, S. Exec. Rep. 6, *supra*, at 9 ("It is my opinion, therefore, that this convention does not invade the domain of State law in the United States.") (statement of Joe C. Barrett, member of the United States negotiating delegation and Arkansas Commissioner of State Laws); S. Treaty Doc. C, *supra*, at 8 ("The most significant aspect of the convention is the fact that it requires so little change in the present procedures in the United States, yet at the same time requires such major changes in the direction of modern and efficient procedures, in the present practices of many other [nations]."") (statement of Secretary of State Rusk); *id.* at 20 ("In its broadest aspects the convention makes no basic changes in U.S. practices, while it makes substantial changes in the practices of many of the civil law countries * * *.") (report of the United States negotiating delegation).

[30] By contrast, Articles 15 and 16 of the Convention impose significant limitations on the entry of default judgments when a "writ of summons or an equivalent document" must be "transmitted abroad for the purpose of service * * * and the defendant has not appeared." See 20 U.S.T. 364-365. As the Convention's ratification history makes clear, Articles 15 and 16 were designed, in part, to provide litigants with a measure of protection from the European practice of "*notification au parquet*." See S. Exec. Rep. 6, *supra*, at 2, 11-12, 14-16; S. Treaty Doc. C, *supra*, at 5-6, 21. That practice permitted a plaintiff to serve a summons upon a nonresident alien by simply delivering the document to a local court official, who was then supposed to transmit the document abroad through diplomatic or other channels. Under that practice, service was effective even if the defendant failed to receive actual notice of the action. See S. Exec. Rep. 6, *supra*, at 11-12. Philip Amram, a member of the United States negotiating delegation, observed that "article 15, when a defendant is in a foreign country, may make a minor change in the practice of some of our States in long-arm and automobile accident cases" (S. Exec. Rep. 6, *supra*, at 15) where, as in the case of *notification au parquet*, service is accomplished by delivery of documents to a state official who subsequently transmits them abroad. Significantly, however, the Convention's provisions do not directly prohibit service through government transmittal of the documents overseas. Instead, they dictate certain unfavorable consequences of serving process through that method by imposing limitations upon the entry of a default judgment and by providing generous terms for reopening any resulting judgment. See arts. 15-16, 20 U.S.T. 364-365.

In this instance, Illinois law permitted in-state service upon VWAG through service upon an involuntary agent residing within the State's borders, and respondent elected to use that method rather than transmit the documents to VWAG in Germany.[31] We question the ultimate wisdom of respondent's decision to forgo use of the Convention in favor of this in-state service method. As a general matter, the United States strongly encourages American plaintiffs to avail themselves of the Convention's internationally accepted procedures, which have proven to be a reliable method for service of process in

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[31] We disagree with VWAG's suggestion (Pet. 17; Reply Br. 8 & n.2) that service of process upon a domestic subsidiary that subsequently transmits the document overseas constitutes service "abroad." "The English term 'service' presents no ambiguity to American or English lawyers; it means the formal delivery of a legal document to the addressee in such a manner as legally to charge him with notice of receiving it." 1 B. Ristau, *supra*, at 123. Illinois law specifies that service shall be accomplished by delivery of process to "any officer or agent of the corporation found anywhere in the State" (Ill. Ann. Stat. ch. 110, para. 2-204 (Smith-Hurd 1983 & Supp. 1987)). Service was thus complete upon delivery of process to VWAG's involuntary agent within Illinois.

most cases.[32] But whatever the wisdom of respondent's decision, we cannot say that the Convention forbids his choice. We accordingly submit that the Illinois Appellate Court did not err in refusing to quash service in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State

JEFFREY P. MINEAR
Assistant to the Solicitor General

DAVID EPSTEIN
Attorney

SEPTEMBER 1987

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[32] See, *e.g.*, *Gould Entertainment Corp.* v. *Bodo*, 107 F.R.D. 308, 309 (S.D.N.Y. 1985); *Oman Int'l Finance Ltd.* v. *Hoiyong Gems Corp.*, 616 F. Supp. 351, 356-357 (D.R.I. 1985). As respondent observes (Br. in Opp. 8), some difficulties have developed recently in convincing Germany's Bavarian Central Authority to serve complaints requesting punitive damages. Respondent's complaint, however, does not contain a punitive damages claim. In any event, we expect that respondent's failure to employ the Convention's procedures may raise serious obstacles to obtaining foreign assistance in enforcing any judgment that he might ultimately receive.

ADDENDUM A

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to bring to the Department's attention a court decision which is likely to have serious adverse effects on international litigation in civil and commercial matters.

In in re Herwig J. Schlunk as Administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, vs Volkswagen AG, the Appellate Court of Illinois, applying Illinois law, held that plaintiff need not comply with the provisions of the Hague Convention on service abroad of judicial and extrajudicial documents in civil or commercial matters when serving a summons and complaint on the German Volkswagen AG, but that it was sufficient to serve those documents on Volkswagen America, Inc., a subsidiary of Volkswagen AG organized under the Laws of New Jersey, which was characterized in the decision as an involuntary agent of Volkswagen AG.

Volkswagen AG has filed a petition for a writ of certiori challenging the Illinois Appellate Court's decision.

Other courts have recently come to similar conclusions and have put into question an established practice of service under the Convention confirmed by both federal and state courts throughout the years. Therefore, the Federal Republic of Germany attaches great importance to the Illinois Appellate Court's decision being reviewed by the Supreme Court of the United States.

The decision of the Appellate Court of Illinois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character.

Serving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague

Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time" and, if the receiving contracting State so requires, in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles. Such a practice rather produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude by the provisions of Article 15 and 16 of the Convention.

Furthermore, letting stand the Illinois Court's decision based upon a doubtful involuntary agent rationale, would mean that foreign defendants, whether corporations located in or private persons residing in a contracting State, could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Such a development would eviscerate the Hague Service Convention and throw its signatories back to the confusion existing prior to its ratification.

It would be contrary to the intentions of the framers of the Convention who meant to put an end to that state of confusion by agreeing on mandatory unified procedures of notification and would lead to inproductive and costly litigation for both American plaintiffs and foreign defendants.

The Embassy would very much appreciate it if the Department were to convey the German position to the Supreme Court of the United States and to join in to defend an international convention which has proved to be beneficial to all of its signatory nations.

Washington, D.C., January 22, 1987.

Department of State
Washington, D.C.

ADDENDUM B

NOTE NO. 54

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honor to draw its attention to the petition for Writ of Certiorari filed in the Supreme Court of the United States in the case of Volkswagenwerk Aktiengesellschaft v Herwig J Schlunk as Administrator of the Estates of Franz J Schlunk and Sylvia Schlunk.

This case involves an appeal against a judgment in the First District Appellate Court of Illinois in which the service of judicial documents upon a foreign defendant abroad has been ordered in accordance only with local state law. By labelling a domestic subsidiary of the German corporation concerned as an involuntary agent for service, the State Court avoided compliance with the provisions of the Hague Convention on the Service Abroad of judicial and extra-judicial documents in civil or commercial matters.

The Hague Service Convention was entered into by the contracting states so as to establish an agreed international method to simplify and expedite the transmission of judicial documents for service abroad. In ratifying its terms the signatory countries were desirous of creating a uniformly applicable system that would ensure effective service, under most circumstances, and afford the defendant abroad sufficient time to prepare a defence. The extensive coverage, the use of forms and the provisions for translation were designed to foster the uniform acceptability and efficacy of the Convention. The Appellate Court's decision is contrary to the essence of the Hague Service Convention.

Furthermore, the Supreme Court has held that international treaties be construed liberally. The Hague Service Convention applies to the service abroad of judicial documents. As, in this instance, where service necessarily involves the transmission of documents abroad, the Convention must be construed in the liberal spirit in which it

was intended, in order to mitigate the inconsistencies and hardships that the drafters sought to redress.

The interpretation of the Appellate Court allows the application of the Convention to be determined by local State law. The reasonable expectation of signatories that the provisions of the treaty will be adopted uniformly should not be frustrated by the inconsistencies in the service rules of the fifty different states of the Union. More specifically, manufacturers of signatory nations will be exposed to similar uncertainties where they have United States dealings that may be characterised only locally as "agents". State laws should yield when they are incompatible with or intrude upon the interpretation of a multi-lateral treaty entered into by the United States to ensure consistent international practice.

In addition, where a defendant's nation does not recognise the service methods as valid, a question as to the enforceability in that nation, of any judgment subsequently procured may legitimately be raised. Compliance with the comparatively straightforward provisions of the Convention can give rise to no such grounds.

Her Majesty's Government believes that it is important to uphold the uniform interpretation and application of this international treaty in the interests of the efficient conduct of international civil and commercial litigation.

Her Britannic Majesty's Embassy would be obliged if the Department of State could take the above views into account in formulating the position of the United States Government towards the present petition.

Her Britannic Majesty's Embassy avail themselves of the opportunity to renew to the Department of State the assurances of their highest consideration.

BRITISH EMBASSY
WASHINGTON DC

24 MARCH 1987

[SEAL]

ADDENDUM C

AMBASSADOR DE FRANCE
AUX ETATS-UNIS

Washington, D.C.
le 7 avril 1987

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur d'attirer son attention sur la demande de saisine de la Cour Suprême ("Writ of Certoriari") présentée par la Société Volkswagen A.G. dans son litige avec Herwig J. SCHLUNK, Administrateur des biens de Frank J. SCHLUNK et Sylvia SCHLUNK. Cette demande de "Writ of Certoriari" fait suite à un judgment de la Cour d'Appel de l'Illinois, qui porte interprétation de la Convention de la Haye du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaires et extra-judiciaires en matière civile ou commerciale ("Hague Service Convention").

La France étant partie à cette Convention, les Autorités françaises considèrent que l'interprétation donnée par la Cour d'Appel de l'Illinois est contraire à la fois à la lettre et à l'esprit de ce traité international.

La Convention de la Haye du 15 novembre 1965 a pour objet de rendre plus efficace et plus simple la transmission à l'étranger d'actes judiciaires. A cet effet, elle établit des procédures précises dont l'une des conditions de fonctionnement est l'uniformité de leur application. Elle est en outre exclusive d'autres moyens de signification de ces actes.

The Department of State
Washington, D.C.

En décidant que la loi locale de l'Etat de l'Illinois pourrait l'emporter sur les dispositions de la Convention, et, en l'espèce, permettait de procéder à la signification d'un acte judiciaire auprès de la filiale américaine d'une société étrangère, le jugement de la Cour de cet Etat aboutit en pratique à priver d'effet les procédures prévues par la Convention et à lui retirer le caractère d'uniformité pour les parties contractantes qu'ont voulu les auteurs de la Convention et qu'ont ratifié les Etats qui y sont parties.

Si la décision de la Cour de l'Illinois était suivie, chaque Etat aux Etats-Unis pourrait décider de suivre ses propres règles en la matière, et la situation juridique en résultant serait semblable à celle existant avant la Convention de la haye, entrainant une confusion dans les procédures, des délais dans l'exécution et des frais dommageables aussi bien pour les sociétés américaines qu'étrangères. Outre les arguments de droit qui justifient l'exclusivité de la Convention, il est donc dans l'intérêt des Parties contractantes d'éviter qu'il soit porté atteinte au principe d'uniformité dans son application.

Pour ces raisons, les Autorités françaises souhaiteraient que leur position soit connue des Autorités américaines et prise en compte dans la définition de la position de l'Administration en réponse à la demande de la Cour Suprême pour l'octroi du "Writ of Certoriari"./.

L'Ambassade de France saisit l'occasion de la présente note pour renouveler au Département d'Etat les assurances de sa très haute considération.

ADDENDUM D

EMBASSY OF JAPAN
WASHINGTON

April 7, 1987

E—52

The Embassy of Japan presents its compliments to the Department of State and has the honor to inform the latter, upon instruction from the home Government, the following:

1. The Government of Japan shares the common concerns expressed by the Note dated January 22, 1987 addressed to the Department of State by the Embassy of the Federal Republic of Germany in Washington, D.C. and to support the conclusion expressed in said note that the role played by the Hague Service Convention on both simplification for service and the protection for the person to be served should be duly evaluated and that the domestic procedures which will impair the intentions of the Convention are undesirable.

2. It, therefore, expresses its expectations that the views both of the Government of Japan and of the Federal Republic of Germany should be duly taken into consideration.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

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AMICUS CURIAE

BRIEF

No. 86-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,

Respondent.

On Petition for Writ Of Certiorari to the Appellate Court of Illinois, First District

MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

WILLIAM H. CRABTREE
EDWARD P. GOOD

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan

JAY M. SMYSER*
1211 North LaSalle Street
Chicago, Illinois 60610
(312) 528-3035

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

"There is nothing
more likely
to start disagreement
among people or countries
than an agreement."

E. B. White,
"My Day,"
One Man's Meat (1944).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a foreign corporation,

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Respondent.

On Petition for Writ Of Certiorari to the Appellate Court of Illinois, First District

---

MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and The Product Liability Advisory Council, Inc. ("PLAC") respectfully move for leave to file the accompanying brief as *amici curiae*. Petitioner has consented to the filing of this brief; respondent has not.

INTEREST OF MVMA AND PLAC

MVMA is a trade organization whose member companies build over ninety-nine percent of all motor vehicles produced in the United States*. Its members also manufacture other products such as farm, industrial, lawn and garden tractors, agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, turbines, and gasoline and diesel engines for industrial, maritime and agricultural uses.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation** whose principal purpose is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability.

MVMA and PLAC members, their parent companies, subsidiaries and affiliates throughout the world have a real and vital interest in the result reached below. That decision, reported at 145 Ill. App. 3d 594, 495 N.E.2d 1114, held it proper to serve a West German corporation under an Illinois statute authorizing service on the alleged domestic agent of a nonresident corporation, making it unnecessary to comply with requirements of the treaty governing service of American judicial process on citizens of West Germany, namely, the Hague Service Convention*.

* MVMA members are American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; LTV Aerospace & Defense Co., AM General Division; M.A.N. Truck & Bus Corporation; Navistar International Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

** PLAC members are American Honda Motor Company, Inc.; American Telephone & Telegraph; Automobile Importers of America, Inc.; Bell Helicopters Textron, Inc.; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; Fiat Auto U.S.A. and Ferrari, N.A.; The Firestone Tire & Rubber Company; Fruehauf Company; Great Dane Trailers, Inc.; International Playtex; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Otis Elevator Co., Porsche Cars North America, Inc.; Sturm, Ruger & Co.; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.

MVMA and PLAC members and their affiliates have a direct and substantial interest in preserving the integrity and exclusivity of the machinery for service of process in transnational litigation created by the Hague Service Convention. The Illinois decision not only violates the Supremacy Clause of the United States Constitution (art. VI, cl. 2), but also cuts the ground from under the valuable purposes of the Hague Service Convention and threatens the re-balkanization of methods for serving American judicial process on citizens of other signatory nations.

If the Illinois decision is upheld, it will destroy a significant part of the system for service created by the treaty, replacing it to that extent with an *ad hoc* factual determination at the start of American litigation with citizens of other signatory nations: was service made in the forum on an "agent" of the alien defendant? It will also deprive citizens of other signatory nations of the protections resulting from the treaty, not the least of which is the assurance that process will ordinarily be received in the language of the recipient. On the other hand, MVMA and PLAC members with "agents" in other signatory nations will face the possibility of retaliatory treatment.

* More formally known as the Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

Some of the affiliates of MVMA and PLAC members manufacture products abroad which are sold here; some MVMA and PLAC members are American subsidiaries of foreign manufacturers; some MVMA and PLAC members manufacture goods here which are sold abroad through foreign subsidiaries. Consequently, MVMA and PLAC members and affiliates, being subject to suit on a global scale, are vitally concerned with preserving the integrity and exclusivity of an international system of service of process that is simple, inexpensive and certain.

MVMA and PLAC therefore move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

January 23, 1987

JAY M. SMYSER
Counsel of Record

1211 North LaSalle
Chicago, Illinois 60610
(312) 528-3035

WILLIAM H. CRABTREE
EDWARD P. GOOD

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan 48202

Subscribed and sworn to before me
this 23rd day of January, 1987.
My Commission expires 11/27/89.

Notary Public

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Respondent.

On Petition for Writ Of Certiorari to the Appellate Court of Illinois, First District

BRIEF OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Rule 36 of the Rules of this Court, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and The Product Liability Advisory Council, Inc. ("PLAC") respectfully submit this brief as *amici curiae* in support of the Petition for Writ of Certiorari to the Illinois Appellate Court, First District.

The *amici curiae* fully endorse the positions urged by the Petitioner in its brief.

INTEREST OF THE *AMICI CURIAE*

The interests of the MVMA and PLAC in this matter are set forth in the accompanying Motion for Leave To File Brief as *Amici Curiae*.

REASONS FOR GRANTING CERTIORARI

Only this Court can put to rest differences that have arisen over the extent to which State law can displace one of this nation's treaties on the same subject.

Can State law purporting to authorize service in the forum on the alleged agent of a nonresident alien corporation displace the American obligation to serve citizens of other signatory nations in accordance with the treaty?

The Illinois Appellate Court decided that the Hague Service Convention has no application when service is made in Illinois, pursuant to Illinois law, on the registered agent of an alleged agent of a citizen of another signatory nation, erroneously assuming that in such case there would be no "occasion to transmit a judicial or extrajudicial document for service abroad." In reality, since the validity of the substituted service in Illinois rests on reasonable certainty the papers served here will be transmitted to the defendant in West Germany, what the court actually held is that the Illinois statute can take the place of the treaty for sending process to that very destination.

The implications of this holding go far beyond the relationship between the corporations in the case *sub judice*.

If upheld, the decision of the Illinois court means that wherever State law permits and a plaintiff can tag here an alleged "agent" of a defendant who is a citizen of another signatory country, the Hague Service Convention can be ignored. Allowing such a decision to stand effects a judicial repeal of a carefully drafted treaty that Congress duly ratified. Allowing such a decision to stand strips an alien of the protections of the treaty if it can be determined the alien has an "agent" here.

With all due respect, the *Amici* believe the question is not *whether* this Court will decide the issue this case presents. Realistically, the only question is *when* this Court will decide the issue.

The Illinois decision threatens to frustrate a significant portion of a carefully wrought system designed to provide simple, inexpensive and certain service in transnational litigation. To that extent it defeats the purpose of the Hague Service Convention, which is, "[a]s the preamble to the treaty makes clear . . . to simplify service of process abroad so as to insure that judicial and extrajudicial documents to be served abroad are brought to the notice of the addressee in sufficient time and to make available *one method* of service that will avoid the difficulties and controversy attendant to the use of other methods." 28 **Fed. Proc., L. Ed.** *Process* §65:131 (1984) (emphasis added).

These factors—rather than the merits, however great, of a particular case—warrant this Court's immediate attention to the issue.

SUMMARY OF ARGUMENT

In violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, the Illinois decision applies Illinois law to a subject governed by treaty. It justifies disregard of the treaty by assuming that in substituted service in the forum on a foreign corporation, the "target for service" is the "agent" found there, rather than the named nonresident defendant. To allow a treaty to be circumvented by such legerdemain violates the Supremacy Clause and defeats the valuable purposes served by the treaty.

ARGUMENT

IT VIOLATES THE SUPREMACY CLAUSE TO PERMIT A STATE STATUTE ALLOWING SERVICE IN THE FORUM ON THE ALLEGED AGENT OF A NONRESIDENT TO DISPLACE THE OBLIGATIONS OF THE HAGUE SERVICE CONVENTION.

The issue in this case involves a conflict between a treaty of the United States and a State statute, each of which is claimed to provide the necessary authority for service of American process on the German corporate defendant.

The Illinois Decision.

In *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 594, 495 N.E.2d 1114 (1986), *leave to appeal denied*, 112 Ill. 2d 595 (1986), the Illinois Appellate Court

affirmed denial of a motion to quash purported service of process on Volkswagenwerk Aktiengesellschaft (VWAG), a corporation organized under the laws of and having its principal place of business in the Federal Republic of Germany (West Germany).

It is important to emphasize at the beginning that VWAG did not, and does not, seek to avoid the judicial jurisdiction of American courts. As the Illinois Appellate Court acknowledged, VWAG does "not contest the legal power of the Illinois courts to consider the claims against it, once process is served in a manner VWAG deems proper." 145 Ill. App. 3d at 600, 495 N.E.2d at 1118. For this Court to reaffirm the supremacy of treaties will not leave Respondent unable to bring Petitioner into an American court; it will simply require Respondent to comply with the Hague Service Convention to accomplish that object.

The Illinois Statute.

Under American law, a foreign corporation, of course, can only be served through statutorily authorized substituted service.[1] "And as a foreign corporation can act only through agents, it is necessary and sufficient that there is service upon *a duly authorized officer or agent* of the corporation within the state, under statutes authorizing and providing for such service." 18A **Fletcher Cyclopedia Corporations** §8735, p. 16 (Perm. Ed. 1977) (emphasis added); M. Culp, *Constitutional Problems Arising From Service of Process on Foreign Corporations*, 19 **Minn. L.**

[1] The term "substituted service" is used in this brief in its more general signification, that is, to refer to service of process upon a defendant in any manner, authorized by statute or rule, other than personal service within the jurisdiction. BLACK'S LAW DICTIONARY, page 1282 (5th ed. 1979).

Rev. 375, 382 (1935); 3 **Thompson on Corporations** §6710, pages 983-984 (3d ed. 1927).

The statutory authority for the purported service here was Section 2-204 of the Illinois Code of Civil Procedure (Ill. Rev. Stats., Ch. 110, §2-204 (1983)):

> Service on private corporations. A private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law. A private corporation may also be notified by publication and mail in like manner and with like effect as individuals.

Although the pertinent part of the statute specifies that service can be made only on a "registered agent or any officer or agent of the corporation found anywhere in the State," the challenged service in this case was actually made on the registered agent of the a'leged agent of the defendant, that is, on the CT Corporation System, the registered Illinois agent for service of process on Volkswagen of America (VWoA), defendant VWAG's wholly owned subsidiary and alleged agent. 145 Ill. App. 3d at 595, 495 N.E.2d at 1115.

The Issues in the Illinois Court.

The service was challenged on three grounds: (1) it violates a treaty to which both the United States and West Germany subscribe, namely the Hague Service Convention, which provides the exclusive means of serving American judicial process on citizens of other signatory nations; (2) the statutory basis for the substituted service does not authorize service on the agent of another corporation; and (3) although VWoA is VWAG's subsidiary, VWoA is not VWAG's agent for purposes of service of process.

The Illinois Appellate Court held that the Hague Service Convention does not apply because service was effected in Illinois on the German corporate defendant's alleged agent's registered agent and, therefore, there was "no occasion for service abroad." 145 Ill. App. 3d at 597, 495 N.E.2d at 1116. It ignored the second ground and, on the third, held, contrary to the record, that VWoA was an agent for service of process of VWAG. 145 Ill. App. 3d at 608, 495 N.E.2d at 1123.

The Issue for This Court.

The fundamental issue for this Court, then, is: can State law purporting to authorize service in the forum on the alleged agent of a nonresident alien corporation displace the American obligation to serve citizens of other signatory nations in accordance with the treaty?[2]

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[2] The other two issues, though valid, become important only if the Hague Service Convention is *not* exclusive. Here, they are of only academic interest.

—It is a fundamental principle of our law, since statutes authorizing substituted service are in derogation of the common law, that when substituted service on a nonresident is challenged, the burden of proof is on the party seeking to sustain service, and "every principle of justice exacts a strict and literal compliance with the statutory provisions." *Galpin v. Page*, 85 U.S. 350, 369 (1873). See also, *State Bank of Lake Zurich v. Thill*, 135 Ill. App. 3d 747, 481 N.E.2d 1215 (1985); *ITT Thorpe Corp. v. Hitesman*, 115 Ill. App. 3d 202, 450 N.E.2d 11 (1983); *Bell Federal Sav. & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 376 N.E.2d 1029 (1978); 9 *FLETCHER CYCLOPEDIA CORPORATIONS* §4410, at 393 (Perm. Ed. 1985); 62 Am. Jur.2d *Process*, §68, p. 848 (1972). "Such statutes 'are construed strictly and the statutory provisions for acquiring jurisdiction of a defendant by other than personal service must be strictly pursued.' Fletcher Encyclopedia Corporation, Vol. 18, §8767, p. 794. And see 42 Am. Jur. *Process*, §66; and 72 C.J.S. Process §64a." *Miller v. Corning Glass Works*, 102 Ariz. 326, 429 P.2d 438, 441 (1967).

(Footnote continued on following page)

Scope of the Convention.

The scope of the Convention is defined in Article 1:

> The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

The only exception is also expressed in the terms of Article 1:

> The Convention shall not apply where the address of the person to be served with the document is not known.

The terms of the treaty, therefore, contemplate that the treaty will provide the exclusive means for transmitting American process abroad to citizens of other signatory nations whose addresses are known.

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[2] *continued*

Under these principles, service on the agent of an alleged agent has been held invalid under the very broad but nonetheless limited language authorizing substituted service on private corporations in the Illinois statute. See, *Mason v. Freeman Nat. Printing Equipment Co., Ltd.*, 51 Ill. App. 3d 581, 366 N.E.2d 1015 (1977); *Cf. Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 725, 413 N.E.2d 457, 464 (1980) ("Even if we were to disagree with the holding in *Mason*, our result would be the same.") and *Cox v. General Motors Corp.*, 132 Ill. App. 2d 209, 267 N.E.2d 513 (1971) (holding return invalid where it did not show person served was corporate officer or agent). Thus, service here on an alleged agent's registered agent was outside the terms of the Illinois statute.

—There is insufficient evidence in this record to sustain plaintiff's burden on the remaining issue—whether the relationship between parent and subsidiary corporations is sufficient to make the subsidiary an "agent" for service of process. See Note, *Jurisdiction over Alien Corporations Based on the Activities of Their Subsidiaries in the Forum: Whither the Doctrine of Corporate Separateness?*, 9 **Fordham Int'l L. J.** 540 (1985-1986).

The treaty says nothing about an exception.[3]

The question, then, is how did the Illinois court decide that there would be no occasion to transmit the documents abroad when service is initially made in Illinois on the registered agent of the alleged agent of the German corporate defendant.

The justification of the Illinois court for ignoring the Hague Service Convention was that, in such a case, the "target for service" is the registered Illinois agent of the alleged American agent, not the named German corporate defendant. 145 Ill. App. 3d at 597, 495 N.E.2d at 1116.

This is the heart of the matter.

The Illinois court thought the "target for service" was the registered agent of the alleged American agent of the German corporate defendant. That agent actually represented the drop point through which the documents were supposed to pass to the German corporate defendant. The "target for service" remained the German corporate defendant located in West Germany.

The view of the Illinois court betrays a misunderstanding of substituted service.

The validity of such service depends on the reasonable assurance that the agent initially served will *transmit* the process to the actual, named defendant.[4]

---

[3] We do not contend that service could not be validly made in this country if the German corporate defendant had *expressly* designated an American agent for service of process. That means something more, however, than the limited agent which must be appointed under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C.A. §1399(e) (1982). See *Sipes v. American Honda Motor Co.*, 608 S.W.2d 125 (Mo. App. 1980).

[4] This doctrine is perhaps most familiar in connection with statutes permitting substituted service on the Secretary of State or

(Footnote continued on following page)

In substituted service on a foreign corporation, the "target for service" is not the agent found in the forum, the conduit through whom the process initially passes. The "target for service" remains the named corporate defendant. With the purported service under the Illinois statute, the papers were being sent to the same place they would have gone under the Hague Service Convention—West Germany. The Illinois statute was construed to let plaintiff attempt to make service on the West German defendant by a method different from that prescribed by the Hague Service Convention.

[4] *continued*
some other state official. In such a case, provision must be made to assure notice to the defendant, and informal notice is no substitute for the jurisdictional requirement of actually transmitting the process to the defendant. Comment *h*, §36, **Restatement (Second) of Conflict of Laws** §36, comment *h* (1986 Revisions) (April 15, 1986); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *ABC Drilling Co., Inc. v. Hughes Group*, 609 P.2d 763 (Okla. 1980); *Cf., Sipes v. American Honda Motor Co.*, 608 S.W.2d 125 (Mo. App. 1980) (failure to provide Secretary of State with corporate defendant's address fatal to purported service).

Similarly, satisfactory substituted service on a corporation requires service on someone who assuredly will *transmit* the papers to the corporate officials responsible for defending it. Friedenthal, Kane & Miller, CIVIL PROCEDURE § 3.20, p. 170 (1985). "The legislature may provide that any person whose relations and duties to the corporation are such that it may reasonably be supposed that notice and the papers will be *transmitted* to the proper corporate officers for the making of its defense may be served." 9 *Fletcher Cyclopedia Corporations* §4412, p. 400 (Perm. Ed. 1985) (emphasis added). *Cf., Blackmer v. United States*, 284 U.S. 421, 439 (1932) (service of subpoena on American abroad):

> "The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad."

Understanding this, the fragile justification of the Illinois court for honoring the Illinois statute and refusing to honor the Hague Service Convention, quite simply, vanishes.

The Supremacy Clause.

The Illinois statute for substituted service on a foreign corporation does not provide a valid alternative to service under the Hague Service Convention on the citizen of another signatory nation. Under the Supremacy Clause, this Court has consistently upheld the primacy of treaties in conflict with State law. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Hauenstein v. Lynham*, 100 U.S. 483 (1879). The most frequent and perhaps analogous occasion for application of the doctrine is in the multitude of cases, too numerous to bear citation, involving the Warsaw Convention. See, for example, *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir. 1982).

Taken together, the Supremacy Clause and the unambiguous terms of the Hague Service Convention render unconstitutional any effort to use the Illinois statute to effect service in this country on the West German defendant. Otherwise, the treaty becomes a meaningless scrap of paper to aliens who may be deemed, under the law of an individual State, to have an "agent" in this country.

CONCLUSION

The terms of the treaty confirm Bruno Ristau's conclusion that, "the Convention machinery is obligatory, except in instances where the state where service is to be

made permits other methods of service of foreign documents." Ristau, **International Judicial Assistance** § 4-10, p. 131 (1984). The Illinois decision consequently violates the Supremacy Clause.

We urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

JAY M. SMYSER*
1211 North LaSalle Street
Chicago, Illinois 60610
(312) 528-3035

WILLIAM H. CRABTREE
EDWARD P. GOOD
MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan

* Counsel of Record

PETITIONER'S

BRIEF

No. 86-1052

In the Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation, PETITIONER

v.

HERWIG J. SCHLUNK, as Administrator of the Estates
of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,
RESPONDENTS

**On Writ of Certiorari to the
Appellate Court of Illinois, First District**

BRIEF FOR THE PETITIONER

HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005

JAMES K. TOOHEY
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
TIMOTHY S. BISHOP
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

PROFESSOR DR. KARL M. MEESSEN
Zobelstrasse 18
D-8900 Augsburg
Federal Republic of Germany

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Hague Service Convention, a multilateral treaty ratified by the United States and the Federal Republic of Germany, provides that in every case in which there is occasion to transmit judicial documents abroad for service on a German national, the plaintiff must translate those documents into the German language and route them to a Central Authority designated by the German government to effect service of such documents on its nationals. The Illinois Appellate Court has held that the safeguards of this federal treaty do not apply if a state court, applying state law principles, characterizes a subsidiary of a foreign defendant located within the United States as an "involuntary agent" for receipt of judicial documents on behalf of the defendant.

The question presented is as follows:

Whether a state court in which an American plaintiff sues a foreign national of a signatory nation may circumvent the exclusive procedures of the Hague Service Convention by characterizing a subsidiary of the defendant located within the United States as an "involuntary agent" for the purpose of receiving judicial documents.

PARTIES TO THE PROCEEDING

The respondent in this case, Herwig J. Schlunk, brought suit against petitioner Volkswagen Aktiengesellschaft (sued herein as Volkswagenwerk Aktiengesellschaft), a corporation organized under the laws of the Federal Republic of Germany with its place of business in that nation, Volkswagen of America, Inc., a wholly-owned subsidiary of Volkswagen Aktiengesellschaft organized under the laws of New Jersey with its place of business in Michigan, and Dennis J. Reed, a resident of Illinois.

PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Subsidiaries and affiliates of Volkswagen Aktiengesellschaft, other than wholly-owned subsidiaries and affiliates, are as follows: (1) Volkswagen do Brasil S.A., and (2) Audi A.G. Volkswagen Aktiengesellschaft also owns shares in a number of non-United States companies, but the shares of these companies are not traded on any exchange.

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TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1052

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation, PETITIONER

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,
RESPONDENTS

On Writ of Certiorari to the Appellate Court of Illinois, First District

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District (Pet. App. 1a-20a) is reported at 145 Ill. App. 3d 594. The order of the Supreme Court of Illinois denying leave to appeal (Pet. App. 21a) is reported at 112 Ill. 2d 595. The order of the Circuit Court (Pet. App. 24a-26a) is unreported.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on June 17, 1986 (Pet. App. 1a). On October 2, 1986, the Supreme Court of Illinois denied

a timely petition for leave to appeal (Pet. App. 21a). The petition for a writ of certiorari was filed on December 24, 1986, and was granted on October 13, 1987. The jurisdiction of this Court rests of 28 U.S.C. § 1257(3).

TREATY AND CONSTITUTIONAL PROVISION INVOLVED

The Convention On Service Abroad Of Judicial And Extra-Judicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, is reprinted at Pet. App. 27a-38a The Supremacy Clause of the Constitution, Article VI, § 2, provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

The issue in this case is whether respondent must comply with the requirements of the Convention On Service Abroad Of Judicial And Extra-Judicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (hereinafter referred to as the "Hague Service Convention") when serving a summons and complaint on Volkswagen Aktiengesellschaft (hereinafter referred to as "VWAG"), a corporation organized under the laws of the Federal Republic of Germany and having its place of business in that nation. The Appellate Court of Illinois held that respondent need not transmit pleadings as prescribed by the Hague Convention, but may instead deliver those documents to Volkswagen of America, Inc. (hereinafter referred to as "VWoA"), a subsidiary of VWAG organized under the laws of New Jersey. Applying Illinois common law, the

court characterized VWoA as an involuntary "agent" of VWAG for the purpose of receiving pleadings directed to VWAG and ruled that, by virtue of this imputed agency, service on VWAG took place in Illinois rather than abroad.

The method of serving process approved by the Appellate Court of Illinois cannot be reconciled with the Hague Service Convention. The court's interpretation clashes with the plain language of the Convention, creates conflicts among its provisions, and renders it useless to achieve the purposes for which it was designed. As we demonstrate in this brief, the language, structure, and purposes of the Convention all compel the conclusion that it prescribes the exclusive method for serving judicial documents on a foreign corporation located in a signatory country, and that state-law "involuntary agency" concepts cannot be invoked to override its safeguards. In so contending, we adhere to the interpretation of the Convention adopted by four of its principal signatories—the Federal Republic of Germany, the United Kingdom, France, and Japan.

A. The Hague Service Convention

The Hague Service Convention is a multilateral treaty formulated by the Hague Conference on Private International Law.[1] It was drafted at the Tenth Session of the Hague Conference in 1964 in response to concerns over the severe practical problems created by the multiplicity of local laws governing service of judicial documents on parties located abroad. The Convention seeks to protect both plaintiffs and defendants involved in international litigation by prescribing a system for serving judicial

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[1] The United States and the Federal Republic of Germany ratified the Convention in 1967 and 1979, respectively. The other signatories to the Convention are listed on page 2, note 2 of the amicus curiae brief filed by the Solicitor General in support of certiorari in this case (hereinafter referred to as "U.S. Amicus Br.").

documents that is inexpensive, reliable, and consistent with standards of fundamental fairness.

The policy of the Hague Service Convention is stated in its Preamble, which declares that it is designed to ensure that judicial documents served abroad "shall be brought to the notice of the addressee in sufficient time." The Convention also serves the purpose of "simplifying and expediting" service of judicial documents on foreign litigants. Pet. App. 27a. The Convention states expressly that its procedures are exclusive: "The present Convention *shall* apply in *all* cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Article 1, Pet. App. 27a (emphasis supplied).

The Convention requires each signatory nation to establish a Central Authority for service of judicial documents that originate in other signatory nations. Article 2, Pet. App. 27a-28a. The Central Authority must serve these documents in a manner consistent with the receiving nation's law. Article 5, Pet. App. 28a.

Article 5 of the Convention grants signatory nations the right to require that judicial documents served on their nationals be "written in, or translated into, the official language . . . of the State addressed." Pet. App. 29a. Moreover, although the Convention generally authorizes methods of service other than those recognized by the receiving nation, any signatory nation may object to such methods to preserve its sovereign authority over services of process. Articles 8 and 10, Pet. App. 30a. When the Federal Republic of Germany ratified the Convention in 1979, it specified that all judicial documents must be "written in, or translated into, the German language." Pet. App. 47a. At the same time, Germany rejected the option, embodied in Article 10 of the Convention, that would allow direct transmission of judicial documents to German nationals in Germany. *Ibid.*

The Convention extends additional procedural protection to persons involved in international litigation. To ensure that recipients of judicial documents have adequate time to respond to pleadings and protect their interests in foreign litigation, Article 15 of the Convention provides that no default judgment shall be entered unless service was made in accordance with the Convention and was received "in sufficient time to enable the defendant to defend." Pet. App. 32a. A default judgment entered without compliance with those requirements may be reopened by the defendant even after the time for appeal has expired. Article 16, Pet. App. 33a. These important guarantees apply in all cases where "a writ or summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention." *Ibid.*

Thus, the Hague Service Convention, as it is in force between the United States and the Federal Republic of Germany, requires that in "all cases" in which pleadings must be transmitted to a party in Germany to apprise it of litigation pending against it in an American court, the plaintiff must utilize the Central Authority designated under German law, must translate the pleadings into the German language, and must afford the defendant sufficient time to frame responsive pleadings.

B. The Present Litigation

The present case arose out of an automobile accident in Cook County, Illinois. Respondent filed suit against Dennis J. Reed and VWoA, alleging that Reed's negligent driving had caused the accident and that VWoA had designed and distributed a defective vehicle. C2-25.[2] Respondent served the summons and complaint on VWoA through delivery to CT Corporation System, VWoA's registered agent for receipt of process in Illinois. VWoA filed a timely answer denying, *inter alia*, that it had

[2] "C" refers to the record before the Appellate Court of Illinois.

designed the vehicle in question. C27-40. Respondent then filed an amended complaint asserting his defective design claims against VWAG. C45-86.

The amended complaint acknowledged that VWAG is organized "under the laws of the Federal Republic of Germany," has its "place of business" at "Wolfsburg, Federal Republic of Germany," is "not authorized to transact business in Illinois," and "is a non-resident of Illinois." C74. Nevertheless, respondent attempted to serve VWAG through CT Corporation System in Illinois. C88, 92.

CT Corporation System advised respondent that it was "not the Statutory/Registered Agent in Illinois for Volkswagenwerk Aktiengesellschaft" and that it was "not authorized to take service for one company in care of another." C88. Ignoring CT Corporation System's explicit denial of authority to accept service for VWAG, respondent then attempted to serve VWAG by delivering to CT Corporation System an "alias summons" addressed to VWoA "as Agent for" VWAG. C93-94. In reality, therefore, respondent delivered process to an "agent" of a purported "agent."

VWAG thereafter filed a special limited appearance for the purpose of quashing service. VWAG did not raise an issue as to the long-arm jurisdiction of the Illinois courts to adjudicate the dispute. It did, however, assert that it could be served *only* in accordance with the Hague Service Convention—even though Illinois law might provide other methods of service—and that respondent had made no effort to comply with any of the Convention's requirements. C96, 101-102, 158-169.

1. *The relationship between VWAG and VWoA*

The relationship between VWAG and VWoA as parent and subsidiary companies was documented in exhibits filed by the parties in connection with VWAG's motion to quash service. As stated in the complaint, VWAG is a corporation established under the laws of the Federal

Republic of Germany with its place of business in that country. It is not authorized to do business in Illinois. It is controlled by a Board of Supervisors comprising officials of the German Federal government, the State government of Lower Saxony, labor and trade union officers, businessmen, and a VWAG executive. C160, 172-174, 268-270.

VWoA is a wholly-owned subsidiary of VWAG. It is incorporated in New Jersey and has its principal place of business in Troy, Michigan. C172-173, 333. VWoA manufactures motor vehicles that it sells to independent distributors and dealers. It manufactured more than 100,000 vehicles in the United States in 1983. It also imports motor vehicles manufactured by VWAG and Audi Aktiengesellschaft and sells them through its dealer network. Until 1984, it imported Porsche cars as well, buying them from an independent German manufacturer that was not owned or controlled by VWAG. C334-335, 339. In addition, VWoA manufactures certain parts and assemblies and purchases others from VWAG and from unrelated suppliers. C172-173. VWoA had worldwide sales of 230,926 vehicles in 1983. C334.

Although eight of VWoA's directors also sit on the Board of Management of VWAG (C383-385), the two corporations are distinct legal and business entities. VWoA has its own capital of $242 million. It also has its own subsidiaries, which are capitalized with an additional $40 million. C333. As of 1983 it had 6,740 employees of its own. C334-C335. VWoA does not share or have in common with VWAG any officers or employees, any bank accounts, lines of credit, books, or corporate records. VWAG does not enter into any contracts or financial commitments for or on behalf of VWoA. Nor does VWAG direct VWoA's marketing or advertising strategy in the United States. C173.

VWoA does business with VWAG only pursuant to legally binding agreements. An "Importer Agreement"

grants VWoA a franchise to use the Volkswagen tradename and trademark and to distribute VWAG's products in the United States. C390-420 (1956 agreement); C422-461 (1973 agreement); C230-261 (1983 agreement). The 1983 Importer Agreement contains an explicit disclaimer of agency (C234), providing that:

> VWoA shall carry on all business arising from this Agreement as an independent entrepreneur on its own behalf and for its own account. VWoA is not an agent or representative of VWAG and shall not act or purport to act for the account of or on behalf of VWAG.

Comparable disclaimers of agency appeared in all of the earlier Importer Agreements. C392, 425.

As would be expected, the Importer Agreement imposes certain requirements on VWoA that are necessary to maintain the quality image of VWAG's products and to protect the value of its tradename and trademark. For example, the agreement sets standards "for maintaining stock and stock levels," it obliges VWoA to "promote the image of VWAG" and "protect VWAG's service and trademarks," and it requires VWoA to "service all Volkswagen products brought to it." Pet. App. 13a. On the other hand, the agreement is terminable by either party (*id.* at 14a), and it leaves VWoA free to adopt its own prices, terms of sale, and methods of distribution of products through its dealer network. The agreement imposes no restrictions on VWoA's handling of products manufactured by other companies.

2. *The rulings of the courts below*

The Circuit Court of Cook County denied VWAG's motion to quash service. The court expressly found that "VWAG has not appointed VWoA as its agent for service of process in common law actions brought against it in Illinois or in any other state in the United States." Pet. App. 25a. It nonetheless held, under Illinois common law

principles, that "VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent." *Ibid.* Accordingly, the court reasoned, service of pleadings could be made on VWAG in Germany through its imputed local "agent" without infringing the Hague Service Convention, which, the court believed, is "applicable only to service of process outside of the United States." *Ibid.*

The Appellate Court of Illinois affirmed. Pet. App. 1a-20a. The Appellate Court acknowledged that the Hague Service Convention supersedes inconsistent state law by virtue of the Supremacy Clause. *Id.* at 4a. However, the court determined that the Convention is inapplicable in any case in which state law would support the characterization of a domestic subsidiary as an "agent" of the foreign parent. In such a case, the court concluded, the "target for service can be found within the state" and "there is simply no occasion for service abroad." *Ibid.* In other words, by the device of labelling VWoA as an involuntary "agent" of VWAG under state law principles, the Appellate Court found it possible to completely bypass the remedial procedures prescribed in the Convention.

In reaching this conclusion, the Appellate Court emphasized that foreign defendants may waive the protection of the Hague Service Convention by accepting service "voluntarily" through local agents of their own selection. It reasoned that a court should also be able to designate an agent for receipt of process as a matter of law and against the wishes of the defendant: "If the Supremacy Clause permits service on agents within the forum state, despite the existence of the Hague Convention (which says nothing about locally appointed agents), it should not matter how that agency relationship came about." Pet. App. 8a. The court did not consider the differences

between a defendant's *voluntarily* waiving the right to receive pleadings in its own language, transmitted through the Central Authority and served in time to give the defendant an opportunity to answer, and an *involuntary* extinction of those rights forced upon the defendant by local law concepts of imputed "agency."

Having concluded that service on an involuntary "agent" within the United States renders the Hague Service Convention inapplicable in its entirety, the Appellate Court proceeded to hold that the "relationship between VWAG and VWOA is so close" that VWoA was properly deemed to be the involuntary "agent" of VWAG for service of process "by operation of law." Pet. App. 17a, 20a. The Appellate Court expressly declined to find that VWoA was "an alter-ego or mere department of its parent" rather than a lawfully constituted and fully-capitalized subsidiary corporation. *Id.* at 20a.[3]

C. The Response Of Other Signatory Nations To The Rulings Of The Illinois Courts

Four signatory nations, representing this country's major trading partners, have protested the rulings of the Illinois courts in diplomatic notes filed with the Department of State. The Federal Republic of Germany stated

[3] The decision of the Appellate Court of Illinois, from which the Supreme Court of Illinois denied leave to appeal, is a final decision subject to review by certiorari under 28 U.S.C. § 1257. The Illinois courts have finally rejected petitioner's claims under a federal treaty, and further proceedings in the Illinois courts would result in irreparable infringement of petitioner's federal treaty rights. Under Illinois law (Ill. Code Civ. P. § 2-301(c)), VWAG's "taking part in further proceedings" on remand would constitute a "waive[r]" of those rights. Since the federal treaty issue raised by petitioner is unrelated to the merits of this case and is not effectively reviewable following further proceedings on remand, this Court has jurisdiction to review the decision below. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975); *Shaffer* v. *Heitner*, 433 U.S. 186, 195-196 & n.12 (1977); *American Motorists Ins. Co.* v. *Starnes*, 425 U.S. 637, 639-642 n.3 (1976).

in a note verbale dated January 22, 1987, that the decision of the Illinois Appellate Court is "likely to have serious adverse effects on international litigation in civil and commercial matters" and is "in conflict with the letter and the spirit of the Convention and ignores its mandatory character." The note further explained that "[s]erving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague Service Convention which is to ensure that documents 'be brought to the notice of the addressee in sufficient time' and . . . in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles." The note pointed out that the Illinois decision produces "effects similar to those of a notification au parquet[,] which the signatories to the Convention intended to exclude," and would "throw [the Convention's] signatories back to the confusion existing prior to its ratification." U.S. Amicus Br. Add. 1a-2a.

The Government of Japan also filed a diplomatic note stating that it "shares the common concerns expressed by the Note dated January 22, 1987 addressed to the Department of State by the Embassy of the Federal Republic of Germany." The Government of Japan warned against parochial interpretations of the Convention that would defeat the goal of "simplification [of] service and the protection [of] the person to be served." *Id.* at 7a.

The Government of France filed a similar diplomatic protest on April 7, 1987, which, rendered in English, declared that "the interpretation given by the Illinois Court of Appeals is contrary to both the letter and spirit of [the] international treaty." The Government of France stated that "the judgment of the State Court in practice renders ineffective the procedures provided for by the Convention and denies it the uniform character for the contracting parties which the authors of the Convention desired." The note verbale also described the serious

adverse practical effects of that judgment: "If the decision of the Illinois Court were followed, each State of the United States would be able to follow its own rules in the matter, and the judicial situation resulting would revert to that existing before the Hague Convention, leading to confusion in procedures, delays in execution, and harmful costs, as much for American companies as foreign ones." *Id.* at 5a-6a.

The United Kingdom filed a diplomatic protest as well, which stated that "in this instance, where service necessarily involves the transmission of documents abroad, the Convention must be construed in the liberal spirit in which it was intended, in order to mitigate the inconsistencies and hardships that the drafters sought to redress." Thus, "[t]he reasonable expectation of signatories that the provisions of the treaty will be adopted uniformly should not be frustrated by the inconsistencies in the service rules of the fifty different states." The United Kingdom noted that failure to adhere to the exclusive system of service prescribed by the Convention would add to the burden of civil litigation by interjecting doubt over the enforceability of judgments: "where a defendant's nation does not recognise the service methods as valid, a question as to the enforceability in that nation, of any judgment subsequently procured may legitimately be raised." *Id.* at 3a-4a.

Each of these diplomatic notes appears in the addendum to the amicus curiae brief filed by the United States in support of certiorari in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The framers of the Hague Service Convention adopted procedures and safeguards governing transnational service of process for the very purpose of protecting parties such as VWAG—a foreign litigant involved in a complex lawsuit in the judicial system of another nation, which must comprehend pleadings written in a foreign language,

and which must take all steps needed to protect its rights from a distance of many thousands of miles. The protections that the Convention confers on litigants in this situation are obviously sensible and fair: it guarantees timely notice in a comprehensible language, a sufficient amount of time to frame a response, and protection against unwarranted default judgments.

The decision of the Illinois Appellate Court has stripped away these protections by authorizing a form of involuntary substituted service outside the framework of the Convention. The court concluded that the Convention can be avoided altogether by delivering pleadings to a fictitious "agent" in the United States, which is then assumed to be responsible for transmitting the pleadings to the foreign defendant when and how it chooses. This ruling is at odds with the literal language used by the framers to define the coverage of the Convention, eviscerates substantive guarantees granted by its literal language, and frustrates each of its underlying purposes.

I.

As in all cases of interpretation, it is essential to begin with the plain language of the Hague Service Convention. In unequivocal terms, Article 1 of the Convention broadly defines its scope: "The present Convention *shall* apply in *all* cases . . . where there is occasion to transmit a judicial or extrajudicial document for service abroad." Pet. App. 27a (emphasis supplied). As this Court held only last Term, this constitutes a "model exclusivity provision." It makes the terms of the treaty "mandatory," not "optional." *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 107 S. Ct. 2542, 2550-2551 & n.15 (1987).

The Illinois Appellate Court nonetheless approved an alternative regime for service of process on VWAG on the theory that the true "target of service" could be found

within the State and not abroad. Pet. App. 4a. On its face, this is an unreasonable construction of the language of the treaty: VWAG is a German corporation; as the complaint concedes, it is not licensed to do business in Illinois and is not present within the State. Yet it is undoubtedly entitled to receive a copy of the summons and complaint before its rights and obligations can be adjudicated, even assuming process may initially be delivered to an "involuntary agent." Thus, there plainly was "occasion to transmit" a judicial document abroad.

Respondent's claim is that VWAG defectively designed the motor vehicle involved in this litigation. VWAG alone could decide how to defend itself against respondent's claim of defective design, and VWAG alone is responsible for satisfying any judgment rendered against it. In these circumstances, VWAG—and not any imputed agent within the State of Illinois—was the "target of service" (Pet. App. 4a) and was entitled to receive "notice . . . in sufficient time" (Convention Preamble, Pet. App. 27a).

Settled principles of treaty interpretation confirm that the court below erred in its grudging construction of the Convention. As this Court repeatedly has held, international treaties "are construed more liberally than private agreements." *Air France* v. *Saks*, 470 U.S. 392, 296 (1985). Thus, where a "treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging them, the more liberal construction is to be preferred." *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933). These rules of interpretation foreclose the conclusion that the Convention simply "does not apply" because the Appellate Court was willing to deputize an "involuntary agent" for receipt of process in Illinois.

II.

The Appellate Court's interpretation of the coverage of the Convention, as defined in Article 1, not only conflicts with the comprehensive language used by its drafters, but

also nullifies other provisions of the treaty as well. If the court were correct in reasoning that the Convention "does not apply" because there was no "service abroad" in this case, then it follows that two key provisions of the treaty would be rendered completely inapplicable and useless to achieve their evident purposes.

First, the Appellate Court's construction of the treaty effectively nullifies Articles 10 and 13 of the Convention, which give signatory nations such as the Federal Republic of Germany the right to prevent service of process on their citizens except through their designated Central Authority. The decision of the court below also violates the customary international rule protecting the territorial integrity of sovereign states, because it countenances direct service of judicial documents within the borders of a state that has objected to that type of service.

Second, the Appellate Court's interpretation strips away the Convention's protection against unwarranted default judgments. Articles 15 and 16 of the Convention grant foreign defendants such as VWAG comprehensive protection against unfair default judgments in foreign tribunals whenever a summons "had to be transmitted abroad for the purpose of service." Yet the result of the decision below is that such defendants have no protection whatsoever against default judgments under the treaty—regardless of the adequacy of notice—simply because process has been directed to them through the conduit of an "involuntary agent."

III.

The Appellate Court's decision frustrates each of the purposes that the Convention sought to achieve. This Court should reject an interpretation that "would fail to effect any purpose of the Convention's framers." *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 255 (1984).

While the framers of the Convention intended its procedures to be exclusive, the decision below authorizes a com-

peting form of service on foreign defendants outside the Convention's framework. While the framers of the Convention intended to create a uniform system for service on foreign defendants, the decision below restores the inconsistent patchwork of local service practices that existed prior to its adoption. And while the framers of the Convention intended to guarantee foreign defendants the right to receive pleadings written in their language in sufficient time to interpose a response, the decision below permits a summons and complaint to be written in an unfamiliar language and severely curtails the time to answer or otherwise plead.

Beyond this, the decision below resurrects one of the principal evils that the Convention sought to eliminate: *notification au parquet*. Under this discredited practice, litigants simply deposited pleadings with "involuntary agents" in the forum state—a miscellany of local officials—who were expected to route them to defendants in other nations, but who frequently failed to give timely notice. As the diplomatic protests filed in this case demonstrate, the Appellate Court's "involuntary agency" theory effectively revives this practice and would thus "restore some of the precise irritants which had long affected the relations" between the signatory nations. *United States* v. *Pink*, 315 U.S. 203, 232 (1942).

The Appellate Court's decision sanctions these adverse effects for no apparent reason. Compliance with the provisions of the Convention is simple and inexpensive. The Convention protects the interests of both plaintiffs and defendants in international litigation by providing a system of service that is fair to defendants and effective for plaintiffs, and that ensures that any judgment ultimately rendered will be enforceable. There is no valid excuse for failing to abide by these remedial procedures. In addition, established principles of international law and comity dictate that the Convention be used in any event.

Furthermore, compliance with the Convention alleviates the workload of state and federal courts involved in the complexities of transnational litigation. Adherence to the Convention's streamlined procedures avoids the need for expensive, burdensome, and unproductive discovery and adjudication addressed to the extraneous issue whether a foreign defendant has a subsidiary, joint venturer, or affiliate in the forum state that could plausibly be characterized as an "involuntary agent." This Court should not construe the Convention in a manner that would permit litigants to convert "a simple [legal] matter" into a "recurring subject of dispute." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185-189 & n.11 (1982).

ARGUMENT

I. THE DECISION OF THE APPELLATE COURT OF ILLINOIS CONFLICTS WITH THE LITERAL LANGUAGE OF THE HAGUE SERVICE CONVENTION AND DISREGARDS SETTLED RULES OF TREATY INTERPRETATION

The decision of the Illinois Appellate Court sanctions alternative methods for serving process on foreign corporations such as VWAG. Litigants in Illinois courts may translate their pleadings and route them to the German Central Authority for service under the Hague Service Convention. Litigants also may make substituted service on "involuntary agents" in Illinois, such as corporate subsidiaries, and thereby avoid the requirements and safeguards of the Hague Service Convention altogether. In the words of the Illinois court, "if the target for service can be found within the state there is simply no occasion for service abroad." Accordingly, the court reasoned, the Hague Service Convention simply "does not apply." Pet. App. 4a.

This interpretation of the Hague Service Convention reduces the treaty to an optional system of assistance for service of process in international litigation and clashes

with the literal language used by its drafters. The terms of the Convention make it clear that the treaty's provisions "shall apply" in "all cases" in which there is "occasion to transmit a judicial . . . document for service abroad." Article 1, Pet. 27a. This language is mandatory, not permissive, as the Court determined last Term in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 107 S. Ct. 2542 (1987).

In *Aerospatiale*, this Court distinguished the Hague Service Convention from the Hague Evidence Convention, which, the Court concluded, creates "optional" procedures for securing evidence in international disputes. In words that apply directly here, the Court pointed out the fundamental differences between the two conventions (107 S. Ct. at 2550-2551):

> The Preamble of the [Hague Evidence] Convention specifies its purpose "to facilitate the transmission and execution of Letters of Request" and to "improve mutual judicial cooperation in civil or commercial matters." . . . The Preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices.

That "optional" system, the Court stressed, stands in marked contrast to the "mandatory" and "exclusive" system prescribed in the Hague Service Convention (*id.* at n.15):

> The Hague Conference on Private International Law's omission of mandatory language in the preamble [of the Hague Evidence Convention] is particularly significant in light of the same body's use of mandatory language in the Preamble to the Hague Service Convention, 20 U.S.T. 361, T.I.A.S. No. 6638. Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."

As this Court concluded in *Aerospatiale*, Article 1 of the Hague Service Convention constitutes "a model exclusivity provision." *Ibid.*

Aerospatiale also refutes the Illinois court's assumption that the Hague Service Convention "does not apply" in this case (Pet. App. 4a) because the international controversy falls within the territorial jurisdiction of the courts of Illinois. This Court expressly rejected the conclusion "that the Convention simply 'does not apply' to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court." *Id.* at 2554. The Court explained that the case before it involved transnational procedural issues subject to the Convention because the evidence in question "is in fact located in a foreign country" and because the procedures of the Convention would "facilitate the gathering of evidence" across international boundaries. *Ibid.*

These conclusions in *Aerospatiale* confirm the Appellate Court's error. The decision below transforms a "model exclusivity provision" into an academic curiosity. It effectively renders the Hague Service Convention a nullity in any case in which a state court is prepared to designate a local entity as an "involuntary agent" for the purpose of receiving process on behalf of a corporation located in a foreign country. This result, we submit, is foreclosed by the literal language of the Hague Service Convention and by settled rules of treaty interpretation.

A. By Its Terms, The Hague Service Convention Applies To All Cases In Which It Is Necessary To Transmit A Summons And Complaint To A Defendant In Another Signatory Nation

The Illinois Appellate Court believed that the phrase "service abroad" in Article 1 of the Hague Service Convention could be read to impose a significant limitation on its scope, carving out an enclave in which the law of the forum state prevails over the uniform rules estab-

lished by the treaty. However, Article 1 of the Convention contains no such domestic law limitation. It declares in broad and encompassing terms that the safeguards of the treaty shall apply in "all cases" in which there is an "occasion to transmit a judicial document" for "service abroad." The plain meaning of Article 1 is that the Convention applies to *all* cases such as this one in which it is necessary to transmit pleadings to a foreign corporation located in a signatory nation to apprise it of litigation in which its rights and obligations will be adjudicated.

The broad coverage of the Convention was obvious to the Senate when it voted for ratification. At that time, the treaty was understood to prescribe "uniform procedures for the service of judicial documents abroad; that is, *in the cases where an action is commenced by a plaintiff in one country against a defendant who is in another country.*" S. Exec. Rep. No. 6, 90th Cong., 1st Sess. App. 5-6 (1967) (emphasis supplied). This understanding of the ordinary meaning of the language of the Convention, expressed at the outset of the ratification process, demonstrates that the phrase "service abroad" is not a grudging, parochial term of art, dependent upon local law or policy, but rather a generic description governing the transmission of pleadings to foreign defendants who are sued in the courts of other signatory nations. As the Solicitor General has observed, "the Convention seeks to establish internationally acceptable methods for serving the judicial documents of one nation within another nation's borders. *Its focus is on the transnational character of service*" (U.S. Amicus Br. 17-18 (emphasis supplied)).

The fiction of characterizing VWoA as VWAG's "involuntary agent" and as the purported "target for service" under Illinois law cannot obscure the fact that, in the words of the Senate Report, respondent, "a plaintiff in one country," is suing VWAG, a West German corporation "in another country," and that the summons

and complaint must reach VWAG abroad so that a responsive pleading may be interposed. That conclusion is irresistible here. Respondent's initial complaint named only VWoA as a defendant. When respondent discovered that the vehicle involved in the accident that gave rise to this litigation was designed and manufactured by VWAG in Germany, he amended his complaint to name VWAG as an additional defendant and to assert defective design and manufacture claims against VWAG. Only VWAG can decide how to defend itself against those charges, and only VWAG is responsible for paying damages in the event of an adverse judgment. VWAG obviously was the "target for service," and respondent's delivery of the complaint against VWAG to VWoA's "involuntary agent" plainly constituted an "occasion to transmit a judicial . . . document for service abroad."

Respondent in fact acknowledged that service of the amended complaint on VWoA was not service on VWAG when he forwarded an "alias summons" to VWoA as "agent" for transmittal to VWAG. VWoA was simply a *conduit* for transmission of the pleadings to the defendant in Germany. Similarly, the Appellate Court did not find, nor could it, that VWAG was itself present in Illinois. Rather, it held that the relationship between VWAG and VWoA was such that VWAG would be " 'fully apprised of the pendency of the action' by delivery of the summons to VWoA." Pet. App. 17a. Like respondent, the court below simply assumed that *VWoA would transmit the service documents to VWAG in the Federal Republic of Germany.* Indeed, it is hornbook law that service on an imputed agent of a corporation presupposes that "notice and the papers will be transmitted to the proper corporate officers for the making of its defense." 9 *Fletcher Cyclopedia of the Law of Private Corporations* § 4412, at 400 (1985).

Absent a presumption that service will be transmitted to the defendant abroad, substituted service on a domestic "involuntary agent" would violate the Due Process Clause of the Fourteenth Amendment. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208, 211-212 (1962). Thus, the Solicitor General has acknowledged that when state law permits "indirect service through a state official (such as the State's secretary of state) or other imputed agent," the "agent" is "charged with responsibility for transmitting process to the foreign corporation" (U.S. Amicus Br. 10), and lower courts uniformly have held that service through an "involuntary agent" is justifiable only where it is reasonably certain that the "agent" "will turn over the process served on it" to its "principal." *Lamb* v. *Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 101 (S.D. Fla. 1985). See also *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So.2d 880, 885 (Ala. 1983) (Torbert, C.J., concurring specially).

In sum, it is undeniable that the real "target for service" in this case was VWAG, a German corporation, and that the substituted service attempted by respondent was premised on the assumption that the recipient of the pleadings, VWoA, would forward them directly to VWAG in Germany. In these circumstances, it is evident that there was "occasion" here "to transmit" a judicial document "for service abroad." The court below, in effect, rewrote Article 1 to provide that "[t]he present Convention shall apply *only in those cases* where there is occasion to transmit a judicial or extrajudicial document abroad and, *under the law of the forum state, service of that document is not deemed to occur prior to its transmittal to the defendant in the state of destination.*" This redrafting of the Convention plainly exceeds the bounds of legitimate interpretation. See *United States* v. *Pink*,

315 U.S. 203, 233 (1942) ("No State can rewrite our foreign policy to conform to its own domestic policies").[4]

B. The Appellate Court's Decision Ignores Fundamental Rules Governing The Interpretation Of Federal Treaties

In addition to clashing with the literal language of the Hague Service Convention, the Illinois Appellate Court's rewriting of the Convention disregards canons of interpretation consistently applied by this Court in treaty cases. As this Court repeatedly has held, international treaties "are construed more liberally than private agreements." *Air France* v. *Saks*, 470 U.S. 392, 396 (1985). Thus, if a "treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933); see also *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928), ruling that a "narrow and restricted" construction of a federal treaty should ordinarily be rejected.

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[4] In contrast to the Illinois court, many other courts have insisted on a literal application of the comprehensive language of the Convention. See, *e.g.*, *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130, 132 (R.I. 1985) ("service on VWAG must be perfected according to the terms of the Hague Convention even though Rhode Island's statutes and rules may provide several other methods for effectuating the service of process"); *Low v. Bayerische Motren Werke, A.G.*, 449 N.Y.S.2d 733, 734-736 (App. Div. 1982) (German manufacturers may not be served through "agents" such as the Secretary of State or domestic subsidiaries because such service would be "in violation of an international treaty," the Service Convention). Accord *Mommsen* v. *Toro Co.*, 108 F.R.D. 444, 445-446 (S.D. Iowa 1985); *Harris* v. *Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775, 776-778 (M.D. La. 1984); *Richardson* v. *Volkswagenwerk A.G.*, 552 F. Supp. 73, 78-79 (W.D. Mo. 1982); *Hamilton* v. *Volkswagenwerk Aktiengesellschaft*, No. 81-01-L (D.N.H. June 10, 1981) (reproduced at C 719-725); *Dr. Ing. H.C.F. Porsche A.G.* v. *Superior Court*, 123 Cal. App.3d 755, 177 Cal. Rptr. 155, 156-159 (Ct. App. 1981).

These principles require rejection of the notion that the phrase "service abroad" denies a foreign corporation sued in an American court the protection of the Hague Service Convention whenever state law deems "service" to have occurred before the pleadings are transmitted overseas. Indeed, the drafters of the Convention stressed that the treaty must be given a liberal construction to avoid such parochial results. See Conférence de la Haye, III *Actes et Documents de la Dixième Session, Notification* 366-367 (1964) ("Charactère Obligatoire De La Convention"), stating that the Convention must be applied "in the liberal spirit in which it is intended" to redress "the hardship and injustice, which it seeks to relieve."

It is particularly inappropriate to elevate the policies of local law—which frequently strike a balance different from that which applies in the international context—over the provisions of a federal treaty governing international service of process. As this Court recently observed, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness" of extending American concepts of jurisdiction "over national borders." *Asahi Metal Industry Co.* v. *Superior Court of California*, 107 S. Ct. 1026, 1034 (1987). Treaties governing service on a transnational basis should not be given an "artificial or special sense impressed upon them by local law." *Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890). Nor should the "meaning of treaty provisions [be] restricted by any necessity of avoiding possible conflict with state [law]." *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929). In our constitutional system it is axiomatic that "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink*, 315 U.S. at 230-231.

The primacy of federal law in this field reflects the binding obligations of the United States under principles

of international law. As explained by the reporters of the *Restatement of the Foreign Relations Law of the United States* § 321 (Tent. Final Draft, July 15, 1985): "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith." The fundamental doctrine of *pacta sunt servanda* "is perhaps the most important principle of international law." It requires that "international obligations survive any restrictions in domestic law." *Id.* at Comment a. As the diplomatic notes filed by four of this country's principal trading partners indicate, the Illinois court's elevation of state policies over the international obligations of the United States under the Hague Service Convention threatens to inflict serious injury on this country's foreign relations. U.S. Amicus Br. Add. 1a-7a.[5]

II. THE INTERPRETATION OF THE HAGUE SERVICE CONVENTION ADOPTED BY THE ILLINOIS APPELLATE COURT CREATES CONFLICTS AMONG ITS PROVISIONS AND NULLIFIES ITS EXPLICIT GUARANTEES

The Illinois Appellate Court's decision does not merely distort the literal language of Article 1 of the Hague Service Convention. It also threatens to unravel the tightly woven fabric of the treaty and to destroy rights expressly conferred by its other provisions.

It is a cardinal principle of treaty construction that the terms of an international agreement should be interpreted in light of "the context in which the written words are used." *Aerospatiale*, 107 S. Ct. at 2550, quoting *Air France* v. *Saks*, 470 U.S. at 397. Because a treaty is in the "nature of a contract between nations" (*Aerospatiale*, 107 S. Ct. at 2550), it must be construed not as a series of disparate and unrelated words or articles but rather

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[5] This Court has emphasized that, in interpreting treaties, "we 'find the opinions of our sister signatories to be entitled to considerable weight.'" *Air France* v. *Saks*, 470 U.S. at 404.

as a unitary whole. Had the Appellate Court heeded this principle, it would have reached a decision opposite from that announced in its opinion.

The Appellate Court's ruling depended solely upon its construction of the words "service abroad" in Article 1 of the Convention. We have explained above why that language, even if read in the limited context of Article 1, was intended to apply to all cases that involve the transmission of judicial documents to a defendant located in another signatory nation. But the Appellate Court's myopic focus on the term "service abroad" was defective for an additional reason as well: it ignored the fact that the whole thrust of the Convention was to provide a comprehensive, self-contained system for transnational service. Nowhere did the court below mention, much less discuss, other provisions of the treaty, for the light they would shed on Article 1.

Thus, the Convention prescribes a detailed scheme governing all aspects of the transmittal of one signatory nation's judicial documents to a defendant in another signatory nation. Articles 3-7, 12 and 14, Pet. App. 28a-29a, 31a. Where the Convention intends to permit service of judicial documents abroad through specified alternative channels, it does so expressly and in unambiguous terms. Articles 8, 9 and 10, Pet. App. 30a. Where the Convention intends to permit "channels of communication" not specified in the Convention (by "contract" or by "internal law" of the receiving state), again it does so expressly. Articles 11 and 19, Pet. App. 30a-31a. And where, as here, a signatory nation has lodged objections to those alternative channels, the Convention mandates use of that nation's Central Authority for service of process. Articles 2, 3 and 13, Pet. App. 27a-28a, 31a. To make its protections complete, the Convention also prohibits entry of a default judgment if pleadings have not been "transmitted by one of the methods provided for in [the] Convention" or by "a method prescribed by the internal law of the State addressed." Article 15, Pet. App. 32a.

The Appellate Court's decision opens a gaping hole in this scheme. As noted above, the "involuntary agent" service used by respondent assumes that the agent will act as a conduit for transmitting pleadings abroad to the true addressee. This channel of transmission is not provided for in the Convention. It is not permitted by the internal law of the Federal Republic of Germany. And it is not authorized by any bilateral agreement between the United States and Germany. It would be astonishing if the drafters of the Convention, or the nations who acceded to the treaty, meant to countenance such a departure from the Convention's basic structure. Moreover, as we now show, this unauthorized method of service conflicts directly with important provisions of the Convention designed to preserve the judicial sovereignty of signatory nations and to protect litigants from unwarranted default judgments.

A. The Appellate Court's Decision Infringes The Right Of Signatory Nations Under Articles 10 and 13 Of The Convention To Prohibit Direct Transmission Of Judicial Documents To Persons Within Their Borders

Many civil law countries that are parties to the Hague Service Convention deem service of process to be a judicial and sovereign act. Those nations regard any form of service upon a resident that is not carried out in accordance with their internal laws to be an affront to their sovereignty.[6] Germany is such a nation. See Deci-

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[6] See Note, *The Hague Service Convention and Agency Concepts: Lamb* v. *Volkswagenwerk Aktiengesellschaft*, 20 Cornell Int'l L.J. 391, 394 (1987); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory*, 1959 Proc. A.B.A. Sec. of Int'l & Comp. L. 34, 35 ("in many foreign countries . . . service of any process or judicial document . . . by anyone other than a judicial officer of that foreign country is held to be in derogation of its sover-

sion of the German Federal Constitutional Court, 63 BVerfG 343, 372 (1983) (service "constitutes a state act in foreign territory and requires the consent of the state concerned"). Thus, "under German legal interpretation, German sovereignty is violated in cases where foreign judicial documents are served directly by mail within the Federal Republic of Germany. By such direct service, an act of sovereignty is conducted without any control by German authorities. . . . This is not admissible under German laws." Federal Republic of Germany, Note Verbale No. 1 (Sept. 27, 1979), quoted in 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)* 80 n.10 (1984).

In deference to these concerns, the Hague Service Convention sought to create a "mutually acceptable judicial procedure" (Note, *supra*, 20 Cornell Int'l L.J. at 392) that would respect the judicial sovereignty of signatory nations through the creation of Central Authorities responsible for making service on defendants in accordance with local law. That accommodation is reflected in Article 10 of the Convention, which provides that a signatory may object to direct postal service, to the forwarding of process by judicial officers of the state of origination, and to the forwarding of process by an interested party. Pet. App. 30a. By filing an objection to such direct service, the state of destination may exercise its sovereign prerogative to insist that all service originating abroad be made through its Central Authority.[7] Moreover, under Article 13 of the

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eignty and is specifically prohibited"); see also *Restatement of the Foreign Relations Law of the United States* (Tent. Final Draft, July 15, 1985), § 471(1) ("Under international law, a state has the right to determine the conditions for service of process in its territory in aid of litigation in another state"); 1963 Advisory Committee Note to Fed. R. Civ. P. 4(i), reproduced in 2 *Moore's Federal Practice* ¶ 4.01[25], at 4-35 (1986).

[7] See Bishop, *The Evolving Judicial Construction of the Hague Service Convention*, Newsletter, Int'l L. Sec., State Bar of Texas 2,

Convention, a Central Authority may refuse to serve process that "would infringe its sovereignty or security." Pet. App. 31a.

The state of destination in this case is the Federal Republic of Germany, which, as noted above, regards the direct transmission of judicial documents to its nationals as an affront to its sovereignty, and, for that reason, has lodged an objection pursuant to Article 10 to any method of service other than through its Central Authority.[8] Consequently, "in the Federal Republic [of Germany], service under the Convention is the exclusive method, and mail service . . . is no longer permissible as a matter of United States law." 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, *supra*, at 131.

The Appellate Court's decision, which permits litigants in Illinois to use a surrogate—a subsidiary company designated as an "involuntary agent"—to send pleadings directly to VWAG in the Federal Republic of Germany, plainly infringes the sovereign prerogatives secured to Germany by Article 10 of the Convention and nullifies Germany's right under Article 13 to screen all service of

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4 (April 1985) (Article 10 permits the signatory nation to ensure that service on its residents will "be made under controlled procedures that would maintain the judicial sovereignty of each nation").

[8] "[T]he German authorities must be in a position to examine whether the foreign request for service is in compliance with the legal provisions established for this purpose and whether it is in compliance with the ordre public of the Federal Republic of Germany. This is the reason why the Federal Republic of Germany has, when depositing the instrument of ratification to The Hague Convention of November 15, 1965, concerning the [Hague Service Convention], objected in accordance with Article 21, Paragraph 2, letter 'a' of the Convention to the application of the channels of transmission as stipulated in Article 10 of the Convention." Federal Republic of Germany, Note Verbale No. 1 (Sept. 27, 1979), quoted in 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, *supra*, at 80 n.10.

process within its territory. The court below apparently believed that Germany's objection to direct transmission of process could be ignored so long as the state of origin permits the plaintiff to shift to an imputed "agent" the logistical task of mailing an "alias summons" overseas. But it is the direct transmission of process across an international boundary—not the identity of the party sending the documents—that infringes the sovereignty of the state of designation.[9]

In sum, where, as here, a signatory nation has refused to allow direct transmission of judicial documents to its residents, the plaintiff must "send" judicial documents through the Central Authority designated by the objecting nation, not through an "involuntary agent" located in the United States. The contrary interpretation adopted by the Illinois court clashes with and nullifies the sovereign rights and policy considerations reflected in Articles 10 and 13 of the Convention. Such an interpretation simply ignores "the procedural and substantive policies of other *nations* whose interests are affected" and disregards the salutary principle that "great care and reserve should be exercised" when extending American notions of jurisdiction and procedure "into the international field." *Asahi Metal Industry Co.*, 107 S. Ct. at 1034-1035.

B. The Appellate Court's Decision Eviscerates The Protection Against Unfair Default Judgments Contained In Articles 15 and 16 Of The Convention

The Hague Service Convention serves the goal of ensuring that pleadings in international litigation are "brought to the notice of the addressee in sufficient time."

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[9] See *Harris* v. *Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775, 777 (M.D. La. 1984) ("In this case plaintiff argues that the Louisiana long-arm statutes . . . authorize service upon the Louisiana Secretary of State and he is authorized to mail the documents to the defendant. But . . . West Germany has specifically rejected service by direct mail. If the provisions of state law conflict with the provisions of an international treaty, by virtue of the Supremacy Clause the provisions of the treaty must prevail").

Preamble, Pet. App. 27a. The Convention achieves that objective through the interrelated provisions of Articles 1, 15 and 16. Article 1 defines the coverage of the Convention. As previously noted, it applies to all cases in which there is occasion to transmit pleadings for service abroad. Articles 15 and 16 protect a foreign defendant from a default judgment if he has not received timely notice by a method of service approved under the Convention. Pet. App. 33a.[10]

A direct consequence of the Illinois court's crabbed construction of the Convention, however, is that foreign corporations with subsidiaries in the United States, and American corporations with subsidiaries in other signatory nations, have *no* protection under Articles 15 and 16 against unfair default judgments. That is so because the protections of Articles 15 and 16 also hinge on the existence of "service abroad" as defined in Article 1. *Compare* Article 1 (the Convention applies in cases where there is "occasion to transmit a judicial . . . document for service abroad") *with* Articles 15 and 16 (the protections against default judgment apply in cases where process is "transmitted abroad for the purpose of service, under the provisions of the present Convention").[11]

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[10] Article 15 prohibits the entry of a default judgment unless the plaintiff establishes that service was made in conformity with the Convention and "in sufficient time to enable the defendant to defend." Pet. App. 32a. Article 16 gives a court power, in cases where service was required to be made "under the provisions of the present Convention, . . . to relieve the defendant from the effects of the expiration of the time for appeal" from a default judgment, where the defendant received no notice of the action in time to defend or of the judgment in time to appeal. *Id.* at 33a.

[11] The Commission of the Hague Conference responsible for drafting the Convention described the reach of the Convention, as set forth in Article 1, in terms virtually identical to those used in Articles 15 and 16. See Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 366 ("It must be stressed that the opinion of the Third Commission was that the Convention

The effect of the Appellate Court's ruling is draconian. It renders the safeguards of Articles 15 and 16 totally inapplicable to the very cases that pose the most serious risk of a default judgment—cases in which process is delivered to an "involuntary agent" that has no legal obligation to forward the pleadings to the actual defendant. Moreover, as explained in greater detail on pages 43-46 below, the Appellate Court's decision revives in a single stroke one of the principal evils that the Convention sought to eliminate—*notification au parquet*. Under that system, plaintiffs in other nations routinely commenced litigation against foreign defendants simply by serving process on local officials who were deemed, as a matter of law, to be "agents" of the defendant. Under the Illinois court's ruling, however, *au parquet* service would not be subject to the provisions of the Convention, because *notification au parquet* does not involve "service abroad" as defined by the law of the forum state, and therefore defendants targeted by this method of service would have no protection against the high risk of default associated with it.

To sustain the Illinois court's interpretation of Article 1 of the Convention, therefore, this Court must assume that the drafters of the Convention perversely intended to prohibit those methods of service (such as service by certified mail) that are most likely to provide timely notice to the defendant, while simultaneously providing *no protection whatsoever* against those methods of imputed "agency" service that create the most serious risk of inadequate notice and default. That assumption is plainly refuted by the history and purpose of the Hague Service Convention. The only rational interpretation of the phrase "occasion to transmit a judicial . . . document for service abroad" in Article 1, and the phrase "transmitted abroad for the purpose of service" in Articles 15 and 16, is that the Convention applies to *all* cases in which it is necessary to transmit pleadings to a foreign defendant located in a signatory nation as part of the process of effecting "service."

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was 'mandatory,' and that requesting States must apply it *in every case in which they need to 'transmit a document abroad for service there'*") (translation from the Rapport Explicatif of the Commission's Reporter, V. Taborda Ferreira).

III. THE DECISION OF THE ILLINOIS APPELLATE COURT FRUSTRATES THE PURPOSES OF THE HAGUE SERVICE CONVENTION

Not only is the Illinois Appellate Court's decision at war with the plain language of the Hague Service Convention, it also frustrates the most fundamental purposes of the Convention and defeats the legitimate expectations of the signatory nations.

This Court's precedents establish that international agreements are "to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca* v. *Thompson*, 223 U.S. 317, 331-332 (1912). A treaty "should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose." *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). See also *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 255 (1984) (rejecting an interpretation of the Warsaw Convention that "would fail to effect any purpose of the Convention's framers").

This also was the expressed intent of the framers of the Hague Service Convention:

> It is to be hoped that those countries which ratify this convention will apply it in the liberal spirit in which it is intended; will apply, in effect, their equivalent of the mischief rule in directing its provisions against the hardship and injustice, which it seeks to relieve.

Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 367. See Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 Int'l & Comp. L.Q. 528, 539 (1965) (the Convention must be construed "in the liberal spirit in which it is intended").

The Appellate Court's construction of the Hague Service Convention ignores this settled rule. By reading the Convention without any regard to its purposes and the evils it was meant to prevent, the court below adopted the narrowest and most niggardly view of the treaty provisions. As a result, the decision renders the Convention largely useless and ensures that not a single one of its beneficial purposes can be achieved. This Court should reject that approach in favor of "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." *Wright* v. *Henkel*, 190 U.S. 40, 57 (1903).

A. The Convention Was Intended To Impose Obligatory, Uniform Rules For Transnational Service In Signatory Nations

The paramount purpose of the Hague Service Convention was to replace the diverse, confusing and conflicting service rules that previously applied to foreign defendants with an *exclusive*, *uniform* standard governing service of judicial documents abroad. The drafters of the Convention intended to eliminate the "procedural chaos" due to an "absence of international collaboration [that] impose[d] hardships on lawyers and litigants both at home and abroad." Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 537 (1953).

The importance attached to these goals of exclusivity and uniformity cannot be doubted. The drafters noted that "enormous practical difficulties had arisen in the delivery and service of judicial . . . documents to persons abroad" and that the remedy was to make resort to the Convention obligatory.[12] They explained that the final draft of the Convention had been profoundly altered ("profondément altéré la rédaction") to make clear its mandatory effect and that doubts about coverage must accordingly be resolved in favor of inclusion ("L'interprétation authentique de la Commission telle qu'elle ressort des débats, est dans le sens de l'application de la Convention"). See Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 366-367 ("Caractère Obligatoire De La Convention"); 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, *supra*, at 131 ("the Convention machinery is obligatory").

The United States also recognized the overriding need to do away with the bewildering patchwork of procedural rules confronting foreign defendants. Thus, in urging the Senate Judiciary Committee to study the problem of international service, the American Bar Association observed:

> With 49 separate procedural jurisdictions in the United States (48 State court systems and the Federal system), *a unitary approach is the only solution*. We can hardly expect the Government of Holland to look favorably on a program of separate negotiation with the representatives of each of the 48 States and with the representatives of the Federal Government. The problems must be solved through a single, unified set of discussions, *the results of which will be effective for all of the 49 jurisdictions*.

S. Rep. No. 2392, 85th Cong., 2d Sess. 7 (1958) (emphasis supplied). During the ratification process, the

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[12] "[B]eaucoup de difficultés s'élèvent dans la pratique en ce qui concerne la transmission et la notification des actes judiciaires . . . à des personnes se trouvant à l'étranger. Ces difficultés ont notamment pour cause; . . . [l]e fait que le systems de transmission prévu dans les Conventions de 1905 et de 1954 n'est pas obligatoire." Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 75 (Rapport de la Commission Spéciale).

Department of State remarked that the purpose of the Convention was to prescribe "*uniform procedures* for the service of judicial documents abroad; that is, in the cases where an action is commenced by a plaintiff in one country against a defendant who is in another country." S. Exec. Rep. No. 6, 90th Cong., 1st Sess. App. 5-6 (1967) (emphasis supplied). And the Senate Foreign Relations Committee supported ratification of the Convention as "an important step toward the international codification of a *uniform law* governing the service of judicial and extrajudicial documents abroad." *Id.* at 3 (emphasis supplied). See also *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir.), cert. denied, 454 U.S. 1085 (1981) (describing the "many state systems [in the United States,] with their differing procedural requirements," as "one of the primary justifications for entering into a treaty that would provide a uniform, valid method of effecting service").[12]

The Appellate Court's construction of the Convention nullifies these objectives of exclusivity and uniformity. First, the Convention would no longer be "obligatory" whenever a plaintiff, applying state law, could find an "involuntary agent" of the foreign defendant within the United States. As noted above, the only due process limitation upon state designation of "involuntary agents"

[12] Thus, the Appellate Court's sweeping assertion (Pet. App. 4a-5a) that the Convention "does not invade the domain of state law in the United States" is patently erroneous. As the Solicitor General has acknowledged, it is "clear that the Convention places major restrictions" on the most common method of service on nonresident defendants in the United States—direct mail service under state long-arm legislation. U.S. Amicus Br. 9-11. Moreover, the Convention plainly was intended to restrict "involuntary agency" service practices such as *notification au parquet* that were permitted under the domestic law of other signatory nations. See pages 43-46, *infra*. Those nations never would have agreed to a treaty that failed to impose reciprocal restrictions on the domestic service practices of the United States.

for receipt of process is the generalized requirement that the "substituted service" be calculated to give the defendant actual notice of the proceedings. In the case of a corporate defendant, therefore, states may provide that service is valid if made upon *any* person or entity whose relations to the corporation make it reasonable to conjecture that the corporation will be notified of the pendency of the action—in a manner and at a time deemed acceptable under local law.

As a result, such "involuntary agents" need not be limited to wholly-owned subsidiaries such as VWoA. The court below candidly remarked that "[i]f the Supremacy Clause permits service on agents within the forum state, despite the existence of the Hague Convention (which says nothing about locally-appointed agents), *it should not matter how that agency relationship came about.*" Pet. App. 8a (emphasis supplied). Accordingly, if the Illinois court's decision is correct, there is nothing to prohibit a state, as a matter of local law, from designating partially-owned subsidiaries, distributors, joint venturers, partners, employees or a host of other United States affiliates of a foreign defendant as its "involuntary agent" for the receipt of service.

That this concern is not chimerical or hypothetical is illustrated by *Karl Schermer & Co.* v. *Alpha International*, No. 87-150 (filed July 24, 1987), another Hague Service Convention dispute pending on this Court's docket. In that case, the New Jersey courts allowed a German corporation to be sued in the state, without resort to the Convention, based upon service on an American insurance company that had sometimes acted as an insurance adjuster for the foreign corporation's German insurer. As *Schermer* demonstrates, given the enormous range of foreign business relationships with companies within the United States (see Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1987* 780-781 (107th ed. 1986)), it

would be the rare plaintiff indeed who could not convert some domestic company or person into the foreign defendant's "involuntary agent," and thereby evade the "mandatory" requirements of the Convention.

Moreover, the Appellate Court's construction, which makes the applicability of the Convention regime turn on when service is deemed to take place *under local law*, would totally destroy any semblance of uniformity in service rules under the Convention. Each of the 50 states—and each signatory nation—could adopt a different local law standard for determining whether service on a foreign defendant has occurred prior to transmittal of the documents abroad. There would be no consistency or predictability in identifying the types of relationships (*e.g.*, subsidiary, affiliate) or the degree of contact (*e.g.*, mere instrumentality, alter ego) that would suffice to warrant "involuntary agent" status. See Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 195, n.8 (1929) (listing more than 18 factors that courts take into account in determining agency status); Note, *supra*, 20 Cornell Int'l L.J. at 403.

Thousands of state and local judges would thus be free to make essentially *ad hoc* determinations as to whether the standard had been satisfied in any particular case. Foreign defendants, unable to predict when proper service on an "involuntary agent" has occurred under local law, would find it impossible to maintain effective management of United States litigation. And because these "involuntary agent" determinations would amount to fact-bound rulings on issues of state law, the conflicting decisions would not be reviewable in this Court, and the federal government would be powerless to ensure that state courts are not frustrating compliance with this country's international law obligations under the Convention. In short, as the Federal Republic of Germany stated in its note verbale, the Illinois court's interpretation of

the Convention would "throw its signatories back to the confusion existing prior to its ratification," because foreign defendants

> could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

U.S. Amicus Br. Add. 2a; see also United Kingdom note verbale, *id.* at 4a.

VWAG's experience provides a concrete and unhappy illustration of the chaos that would ensue under an "involuntary agent" theory. Faced with *precisely the same set of facts*, numerous "courts have split on the question of whether [VWoA] is [VWAG's] agent under common law agency rules." Note, *supra*, 20 Cornell Int'l L.J. at 410-411.[14] VWAG's situation is hardly unique. According to one recent census of subsidiary corporations, more than 2,700 foreign companies own subsidiaries in this country. That figure includes most of the major foreign manufacturers that sell products in the United States. See *Who Owns Whom (North America)* 487-609 (Dun & Bradstreet 1985). A regime such as this would generate the very kind of debilitating uncertainty that this Court

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[14] Compare, *e.g.*, *Lamb* v. *Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95 (S.D. Fla. 1985); *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So.2d 880 (Ala. 1983); and *Crose* v. *Volkswagenwerk Aktiengesellschaft*, 88 Wash.2d 50, 558 P.2d 764 (1977) (finding "involuntary agency"), with *Richardson* v. *Volkswagenwerk Aktiengesellschaft*, 552 F. Supp. 73 (W.D. Mo. 1982); *Utsey* v. *Volkswagen of North America*, No. 80-1620-9 (D.S.C. Sept. 18, 1981) (reproduced at C792-797); *Hamilton* v. *Volkswagenwerk A.G.*, No. 81-01-L (D.N.H. June 10, 1981) (reproduced at C719-725); and *Jones* v. *Volkswagen of America*, 82 F.R.D. 334 (E.D. Tenn. 1978) (refusing to impute agency). See generally Note, *supra*, 20 Cornell Int'l L.J. at 403-404 & n.101.

criticized in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185-189 (1982), when it upheld the separate status of "foreign corporations" and their wholly-owned American "subsidiaries" under an international convention. The Court refused to endorse a nebulous "control test" that would needlessly convert "a simple [legal] matter" into a recurring "subject of dispute." *Id.* at 185 n.11.

The Court's criticism in *Sumitomo* applies in this context as well. Given the background of the Hague Service Convention, discussed above, it is simply inconceivable that Germany, France, Japan, the United Kingdom, and our other major trading partners would have negotiated for this treaty to protect their citizens in American courts if they thought that each of the 50 states would be at liberty to say that the Convention simply does not apply to their nationals whenever process can be physically delivered to an "involuntary agent" for transmission abroad. The signatory nations spent years devising procedures intended to remove the obstacles and confusion confronting defendants in international litigation because of the different service requirements of various countries and their political subdivisions. The Appellate Court's decision reestablishes those obstacles and confusion: the Hague Service Convention is no longer exclusive, and the procedures for serving foreign defendants are no longer uniform.

B. The Convention Was Intended To Confer Important Procedural Protections On Defendants Sued In Foreign Nations

Strict adherence to the provisions of the Hague Service Convention is essential not merely out of a sense of international obligation and comity. The Convention was intended to grant valuable rights to defendants sued in foreign courts. The Preamble states that the Convention is intended "to improve the organization of mutual judicial assistance . . . by simplifying and expediting the

procedure" for service of foreign residents, thus ensuring that "judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee *in sufficient time" to defend itself.* Pet. App. 27a (emphasis supplied). This objective also would be defeated if the procedures negotiated by the signatory nations could be evaded simply by serving foreign defendants' "involuntary agents" rather than the defendants themselves.

To begin with, "involuntary agents," not having been appointed by foreign defendants for the purpose of receiving judicial documents on their behalf, would have no obligation to forward such documents to the intended recipients in timely fashion. There is a substantial risk, for example, that the individual employee of a domestic subsidiary who receives the documents and who owes no direct duty to the parent company may misread them and assume that they are intended only for the subsidiary, or may fail to act promptly in transmitting the pleadings to the defendant parent company overseas. In such cases, pleadings would necessarily be passed through the hands of unauthorized entities and would arrive in the foreign country days or weeks after the purported date of service.[15]

To make matters worse, pleadings served on "involuntary agents" are unlikely to have been translated into the foreign defendant's language. Yet the drafters of the Convention believed that, in order to provide "a sufficient safeguard of the defendant's interest . . . [a] defendant receiving a document from a foreign country should be

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[15] In the present case, for example, respondent delivered an ambiguously worded "alias summons" and a complaint, written in English, to CT Corporation System in Illinois. Despite CT Corporation System's denial of authority to accept process, respondent insisted that the pleadings be forwarded to VWoA in Michigan. From Michigan, the pleadings were required to be transmitted abroad for service in untranslated form on VWAG in Germany. It is difficult to conceive of a method of service more antagonistic to the letter and purpose of the Hague Service Convention.

able to understand the gist of the matter without having to engage a translator." Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 132. To accomplish that goal, Article 5 of the Convention provides that when service is made through a foreign Central Authority, "the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed." Pet. App. 29a. Many signatory countries, including the Federal Republic of Germany, impose such a translation requirement. See 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, *supra*, at 147-149.[18]

Thus, if the Convention could be circumvented by resort to an "involuntary agent" rationale, foreign defendants (especially multinational companies) would routinely be confronted with judicial documents, pouring in through various sources in unpredictable fashion, written in languages other than their own, and arriving days or weeks after their time to respond will have started to run. Those defendants would then be required to translate the papers before they could begin the complex process of retaining local counsel thousands of miles away, investigating the cases, and preparing their procedural and substantive responses to the complaints. See *Asahi Metal Industry Co.*, 107 S.Ct. at 1034 (noting

[18] The United States has expressed concern over the fact that the blank standard forms used in connection with service under the Convention can be written either in English or French. The American delegate to the Special Commission on the Operation of the Convention announced that, if intended for United States defendants, the forms *must be filled out in English*, because documents written entirely in French "plainly fail to give to the recipient notice which is reasonably calculated to impart knowledge of an impending action." *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 Int'l Legal Materials 312, 317 (1978).

"[t]he unique burdens placed upon one who must defend oneself in a foreign legal system").

In these circumstances, the right of foreign defendants to a reasonable period to plead will have been greatly infringed, with a severely adverse effect on their ability to avoid a default judgment or a preliminary injunction and to assert all appropriate procedural protections (such as the right to remove a case to federal court, which is waived if not exercised within 30 days; see 28 U.S.C. § 1446(b)). (The problem is exacerbated when one considers that "involuntary agent" service may also be imposed upon individual persons who are foreign nationals.) It is impossible to reconcile this inequitable result with the procedural system that the drafters of the Convention thought they had established.

C. The Appellate Court's Decision Would Resurrect The Specific Service Practices That The Convention Was Adopted To Eliminate

It is bad enough that the Illinois Appellate Court's interpretation of the Hague Service Convention renders the Convention irrelevant in large categories of cases involving suits against foreign defendants and destroys many of the procedural protections that the Convention intended to confer on such defendants. What is unconscionable is that the court's "involuntary agent" rationale recreates and sanctions the particular service practices that gave rise to the Convention.

As previously noted (see page 32, *supra*), before ratification of the Convention, many civil law countries utilized a system of service known as *notification au parquet*. Under this system of service, plaintiffs in countries such as France, Belgium, and the Netherlands routinely commenced litigation against foreign defendants—frequently, American defendants—simply by serving process on local officials who were deemed, as a matter of local law, to be agents of the defendant. The local officials were then supposed to transmit the document

abroad through diplomatic or other channels. Under *au parquet* practice, however, service was effective upon delivery to the local official, even if the foreign defendant failed to receive actual notice of the action. See S. Exec. Rep. No. 6, *supra*, at App. 11-12.

The United States delegates who participated in drafting the Convention were principally concerned with protecting American citizens against such unfair service practices by requiring all signatory nations to adhere to the mandatory and uniform system of actual notification embodied in the Convention.[17] See S. Exec. Rep. No. 6, *supra*, at App. 6, observing that the Convention "provides a high degree of assurance that if an American citizen in the United States is sued in the courts of a state party to this treaty, he will be notified of the suit in sufficient time to enable him to defend the action." The United States therefore advocated the Convention's "widest ratification abroad as a necessary protection for the interests of U.S. nationals who may be defendants in litigation in foreign countries having the *notification au parquet* system." *Id.* at 12. At the same time, the United States fully recognized that preservation of the safeguards of the Convention for American citizens haled into the courts of other nations was dependent upon according foreign defendants equivalent protection in American courts. "The obverse is also true. *If a person outside the United States is sued in one of our courts, the necessary steps must be taken to insure that he will be notified of the action and afforded an opportunity to defend.*" *Id.* at 6-7 (emphasis supplied).

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[17] See Conférence de la Haye, III *Actes et Documents de la Dixième Session*, *supra*, at 152 (comment of Delegate Arnold); Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 Cornell Int'l L.J. 125, 130 (1969) ("The United States properly sought to stop this practice"); Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 653 (1965).

Against this background, it would be ironic if this country were to adopt a construction of the Convention that would effectively resurrect the discredited practice of *notification au parquet*. Yet that would be the inevitable result of endorsing the Appellate Court's "involuntary agent" rationale. If a state is free to determine, under local law, that a subsidiary, affiliate or other private person is the "involuntary agent" of a foreign defendant for purposes of service of process, there is no apparent reason why it could not equally provide that service on a foreign corporation is complete when delivered to the Secretary of State or some other public official. See Note, *supra*, 20 Cornell Int'l L.J. at 408.

The Secretary of State is no different from a subsidiary in practical, operational terms. He is present within the state, may be served there, and may be required to send the document to the foreign defendant. Certainly, substituted "public" agency service on a governmental official is no more objectionable than substituted "private" agency service on a subsidiary or affiliate. In both instances, the "involuntary agent" must transmit the pleadings overseas and has no obligation to translate them into the defendant's language, and the defendant's time to answer or otherwise protect its legal rights would begin to run before it received the documents. Indeed, such transmittals are likely to be more reliably performed by a public official, who would have a bureaucracy prepared to recognize and deal with substituted service, than by the odd assortment of ad hoc "agents" sanctioned by the decision below.[18]

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[18] The lower courts uniformly have refused to allow the Convention's procedures to be circumvented by delivering pleadings to the Secretary of State who, in turn, would be responsible for transmitting them to the defendant abroad. See, *e.g.*, *Cipolla* v. *Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985); *Harris* v. *Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D. La. 1984); *Hamilton* v. *Volkswagenwerk Aktiengesellschaft*, No. 81-01-L (D.N.H. June 10, 1981) (reproduced at C719-725).

In sum, if the Illinois court correctly held that the remedial procedures and other rights granted by the Convention may be completely bypassed by a finding, under local law, that a foreign defendant has an "involuntary agent" within the state, there would be nothing to prevent a signatory nation from resorting once again to *notification au parquet*. At that point, the Convention would have become a dead letter. This conclusion has not been lost on other parties to the Convention. As the Federal Republic of Germany observed in its note verbale, the practice endorsed by the Appellate Court "produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude" (U.S. Amicus Br. Add. 2a). The decision below would thus "restore some of the precise irritants which had long affected the relations between" the signatory nations "and which the [Convention] was designed to eliminate." *United States* v. *Pink*, 315 U.S. at 232.

D. The Appellate Court's Decision Is Contrary To The Interests Of American Plaintiffs As Well As Foreign Defendants

The procedures established by the Hague Evidence Convention impose such a minimal burden upon litigants that it is difficult to understand why any court would fail to enforce them or why any plaintiff would object to using them. The Service Convention is simple and straightforward and unquestionably effective for the purpose of accomplishing service on a foreign defendant. All that a plaintiff such as respondent had to do was to translate the summons and complaint and mail the English and German versions together with the service form to the German Central Authority.[19]

By allowing respondent to dispense with these minimal requirements of international service, and by recognizing

[19] See U.S. Amicus Br. 19 ("the United States strongly encourages American plaintiffs to avail themselves of the Convention's internationally accepted procedures, which have proven to be a reliable method for service of process").

a competing method of serving foreign defendants outside the structure of the Convention, the Appellate Court's decision subordinates the substantial interests of foreign nations and litigants to the comparatively trivial concerns of American plaintiffs. This Court, however, in keeping with basic principles of international law, has "long recognized the demands of comity" and has required American courts to "demonstrate due respect" for the special problems of foreign litigants and "for any sovereign interest" of a foreign state. *Aerospatiale*, 107 S.Ct. at 2557. It has specifically demanded that American courts not "find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state." *Asahi Metal Industry Co.*, 107 S.Ct. at 1035. "Considering the international context" of this dispute, it was "unreasonable and unfair" and a breach of comity for the Illinois court to interpret the Convention in such a way that the significant interests of signatory nations must give way to the "slight interests of the plaintiff." *Ibid.*

Indeed, so weighty are the sovereign interests of the Federal Republic of Germany in preserving its territorial integrity and its authority to supervise service of process on its own nationals, and so compelling are VWAG's interests in receiving process in its own language and in sufficient time to respond, that the Appellate Court's acceptance of respondent's excuse for evading the Convention conflicts fundamentally with customary principles of international law. According to "the authoritative guide to current treaty law and practice" (S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971)), a court construing a treaty must take into account "any relevant rules of international law applicable in the relations between the parties." Article 31(3), Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, *reprinted* in 8 Int'l Legal Materials 679, 692 (1969). The World Court has stated that "the first and foremost restriction imposed by international law" is that a nation may not attempt to

"exercise its power *in any form* in the territory of another State" without express permission. *SS Lotus*, 1927 P.C.I.J,. Ser. A., No. 10, at 18-19 (emphasis supplied). Thus, even if the Convention were not "mandatory" and "exclusive"—as it plainly is—customary principles of international law, as reinforced by the doctrine of comity, would independently require resort to its procedures. See *Aerospatiale*, 107 S. Ct. at 2557; see also *id.* at 2561 (Blackmun, J., concurring).

American citizens engaged in transnational litigation will suffer as well from the Illinois court's disregard of these principles. Reciprocity is an important and pervasive concept in international law. If this Court were to hold that the Convention is inapplicable to foreign defendants served in the United States through an "involuntary agent," it is reasonable to assume that other signatory nations may follow suit, to the great detriment of American defendants overseas.[20]

Moreover, the Appellate Court's decision ignores the fact that the Convention confers substantial protections upon American plaintiffs as well. Prior to the Convention, service in foreign nations was "cumbersome," "inefficient" and "costly" (S. Rep. No. 2392, *supra*, at 2) and seldom could be accomplished without engaging the assistance of foreign lawyers. By complying with the Convention, an American plaintiff may effect service that not only is unobjectionable to the foreign defendant, but that also is unobjectionable to the defendant's nation.

This latter point is especially significant, because it means that any judgment that the plaintiff ultimately obtains would be enforceable in the foreign defendant's country (where the defendant's only assets may be found). "Many civil law countries will not recognize as

[20] This is not a trivial concern. The Solicitor General has reported that, in fiscal year 1986, the United States Central Authority received more than 5,000 incoming requests for service on American citizens pursuant to the Convention. U.S. Amicus Br. 3 n.3.

valid an American judgment which is entered upon service on a party within their territories, unless service has been made by their own officials as required by their own law." Jones, *supra*, 62 Yale L.J. at 537. See Note, *supra*, 20 Cornell Int'l L.J. at 409. Thus, as the United States has frankly acknowledged, "we expect that respondent's failure to employ the Convention's procedures may raise serious obstacles to obtaining foreign assistance in enforcing any judgment that he might ultimately receive." U.S. Amicus Br. 20 n.32. See also United Kingdom note verbale, U.S. Amicus Br. Add. 4a ("where a defendant's nation does not recognise the service methods as valid, a question as to the enforceability in that nation, of any judgment subsequently procured may legitimately be raised"). The Convention eliminates this problem by announcing that "certain basic methods of service are recognized as valid in both the state of origin and the state addressed." Committee on Int'l Law, *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents on Civil or Commercial Matters*, 22 Rec. Ass'n Bar of N.Y.C. 280, 286 (1967). It therefore "facilitate[s] enforcement of United States judgments in the courts of contracting States against defendants served in such States." *Ibid.*

Finally, the Illinois court's unduly restrictive construction of the Hague Service Convention imposes substantial burdens not just on plaintiffs and defendants, foreign and domestic, but also on the judicial system and the public interest. It invites protracted and wholly unproductive litigation in every case over the threshold question whether a subsidiary, affiliate or other person is the "involuntary agent" of a foreign defendant.[21] And it opens

[21] In *Wingert* v. *Volkswagenwerk Aktiengesellschaft*, No. 3-86-2994-16 (D.S.C. May 19, 1987), for example, the district court refused to condone substituted service on VWoA as an alternative to serving VWAG under the Hague Service Convention. The court cited the unwarranted burden on the judicial system that would result from this approach: "Not only would additional discovery be necessary but the Court would then have to determine the sufficiency

the door to unnecessary disputes, irritating to foreign governments and damaging to international commerce, over the enforceability of judgments issued by United States courts. Failure to abide by the simple, internationally-accepted procedures prescribed in the Convention thus is certain to increase the burden and expense of civil litigation and to prejudice our foreign relations—with no countervailing public benefit.

CONCLUSION

The judgment of the Appellate Court of Illinois, First District, should be reversed.

Respectfully submitted.

HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005

JAMES K. TOOHEY
Ross & Hardies
150 N. Michigan Avenue
Chicago, Illinois 60601

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
TIMOTHY S. BISHOP
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

PROFESSOR DR. KARL M. MEESSEN
Zobelstrasse 18
D-8900 Augsburg
Federal Republic of Germany

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of the evidence as to VWoA's agency status." By contrast, the court noted, compliance with the Convention would impose no material burden on the plaintiff: "There is nothing to indicate that such a procedure is unduly burdensome to the plaintiff or that it would be more time-consuming than making an affirmative showing of agency. . . . [T]he Court is persuaded that adherence to the uniform procedures for service under the Hague Convention is preferable to an *ad hoc* evaluation of the relationship between VWAG and VWoA." Slip op. 3. Copies of the *Wingert* decision have been lodged with the Clerk of this Court and served upon counsel for respondent.

RESPONDENT'S

BRIEF

No. 86-1052

In The

Supreme Court of the United States

October Term, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK, Deceased, and SYLVIA SCHLUNK, Deceased,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District

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BRIEF FOR THE RESPONDENT

JACK SAMUEL RING
Counsel of Record
JUDITH E. FORS

JACK SAMUEL RING & ASSOCIATES, LTD.
69 W. Washington Street
Chicago, Illinois 60602
(312) 782-5462

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Whether service within the United States which complies with the due process provisions of the federal Constitution is rendered invalid by an international treaty explicitly limited to the service of judicial and non-judicial documents abroad.

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BRIEF FOR THE RESPONDENT

TREATY AND CONSTITUTIONAL PROVISION INVOLVED

The Convention On Service Abroad of Judicial And Extra-Judicial Documents in Civil And Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 is reprinted at Pet. App. 272-382.

Section One of the Fourteenth Amendment of the Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PREFATORY NOTE

The Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (hereinafter referred to as the "Service Convention"), has no application to the case at bar. Service upon the petitioner was accomplished wholly within the sovereign borders of the United States. Further, service upon the petitioner fully complied with the due process requirements of the federal Constitution in that it undeniably provided petitioner with prompt and meaningful notice. With all due respect for the concerns voiced by the petitioner and the Federal Republic of Germany (which had or has an interest in Volkswagenwerk Aktiengesellschaft), the laws of that nation cannot, and do not, affect the application of American law, within the United States, upon foreign nationals doing business in this country.

Indeed, lost in all of petitioner's rhetoric regarding the burden imposed upon it by the decision of the Illinois Appellate Court are three critical facts:

1. Petitioner is a West German corporation which has voluntarily chosen to do business in the United States of America in the form of a wholly-owned and completely controlled subsidiary.

2. In search of its profit, petitioner came to the United States with full knowledge that this is a

country which operates under a federal system of government in which the several States actively develop their own bodies of law - all subject to the protections afforded by the United States Constitution.

3. Petitioner has expressly admitted that it is subject to the jurisdiction of the courts of Illinois, and has not challenged the finding that under Illinois law its subsidiary was its agent for service of process.

With these facts in mind, petitioner's prolix arguments about the difficulties of dealing with the laws of the several States ring hollow, and it becomes patently clear that petitioner, for no better reason than its own convenience, is asking this Court to rewrite a convention designed to provide judicial assistance for service in foreign lands into a nationwide standard applicable only to foreign corporations. Such a holding would grant petitioner an exemption from the laws of the several States not enjoyed by any domestic corporation, not contemplated by our government in ratifying the treaty, and not even remotely suggested by the plain language of the treaty.

Of even more alarming note are the constant and strident proclamations that should the Appellate Court's construction stand, foreign nationals will find themselves subject to the whims of "thousands of state and local judges" making "ad hoc determinations as to whether the standard [for service on a foreign defendant] had been satisfied in a particular case." (Pet. br. 38) The suggestion of incompetence and absence of due process guaranties provided by our court system is untenable, as is the suggestion that the United States ever intended to bargain away the safeguards of due process already established in this country.

The further suggestion made by the Federal Republic of Germany that we must proceed its way (the way prescribed for the German citizenry) or forever bear the consequences, which may include a failure to honor judgments

or notify American defendants sued in West Germany, is an affront to the sovereignty of this country. (Brief for the Fed.Rep.Ger. as Amicus Curiae at 16).

The Illinois Appellate Court correctly held that the Hague Convention on Service Abroad is not applicable to service on the subsidiary/agent of the petitioner within the United States. The holding affords petitioner full due process of law and in so doing does not clash with the plain language of the Convention, create conflicts among its provisions, nor render it useless to achieve the purposes for which it was designed. In fact, the Appellate Court's holding places the Convention in its proper and useful perspective for all signatories.

That decision should be affirmed.

STATEMENT OF THE CASE

On December 17, 1983, Franz and Sylvia Schlunk, the parents of the respondent and his two brothers and sister were killed on an Illinois highway as a result of design defects in their 1978 Volkswagen Rabbit automobile which rendered it uncrashworthy. (R. 45).[1] The car had been designed, manufactured and tested in Germany by the petitioner, Volkswagenwerk Aktiengesellschaft (VWAG), and sold in the United States through VWAG's wholly-owned subsidiary and self-proclaimed marketing arm, Volkswagen of America (VWoA). Respondent filed a wrongful death action in the Circuit Court of Cook County, Illinois and, on November 19, 1984, VWAG was served through VWoA. (R. 93A).

On December 18, 1984, the attorneys representing both VWoA and VWAG filed a Special and Limited Appearance on behalf of VWAG for the purposes of quashing service. (R. 96). In support of the motion to quash, the Volkswagen attorneys offered the affidavit of one Robert

[1] "R." refers to the record before the Appellate Court of Illinois.

Cameron, manager, product liaison of **VWoA** (R. 172); a fact which itself demonstrates the control which VWAG exercises over VWoA, for, in a case such as this, the distributor, VWoA, would normally have interests at least partially at odds with those of the manufacturing defendant, VWAG.[2]

After production of various documents regarding the relationship of VWoA and VWAG, VWAG's motion was denied. (R. 942-944). That denial was affirmed by the Illinois Appellate Court (145 Ill.App.3d 594), and the Illinois Supreme Court denied VWAG's Petition for Leave to Appeal (112 Ill.2d 595). VWAG then successfully petitioned to this Court for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The essential misconception upon which the petitioner relies in this matter is that the Hague Service Convention provides the mandatory and exclusive method for serving judicial documents on a foreign corporation located in a signatory country. Arising from the flames of this misconception is the smokescreen of "involuntary agency." The plain truth is that the Hague Service Convention was created as a "useful tool" to be used for serving judicial documents on foreign corporations located in signatory countries "where there is occasion to transmit a judicial or non-judicial document for service abroad." There are, however, circumstances which obviate such occasions, one of which is when, under due process requirements, service of process can be accomplished through an agent within the sovereign borders of our nation.

[2] When, as here, design defects provide one of the bases of liability, a distributor will often be in a position to seek indemnity or contribution from the manufacturer. *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill.2d 17, 20 (1975); *Suvada v. White Motor Co.*, 32 Ill.2d 612, 624 (1965). Here, however, the distributor is assisting the efforts of the manufacturer to avoid being brought into the lawsuit.

There is no question that service upon VWAG through its wholly-owned subsidiary, VWoA, met the due process requirements of our federal Constitution. The control exercised by VWAG over VWoA is overwhelming and under all accepted analyses meets the requirements for holding the subsidiary the agent of the parent for service of process. The Appellate Court therefore properly determined that within the confines of the due process guarantees of the United States Constitution, VWoA was indeed the agent for service of process in Illinois for VWAG whether or not so appointed by petitioner. In sum, VWAG was accorded the same scrutiny that is applied to a domestic corporation without a registered agent in Illinois, and it justly received the same treatment a domestic corporation would receive.

The language and legislative history of the Hague Service Convention clearly indicate that the Convention was intended as a tool to be used when service within the United States could not be obtained. It was, in fact, welcomed by Congress as an effort on the part of other signatories to mold their procedures in the direction of our concepts of due process.

Finally, having occurred fully within the United States, service in this case does not offend principles of international comity, nor should it offend the judicial sovereignty of West Germany.

The holding of the Appellate Court in this case properly defines the scope of the Convention. That decision should be affirmed.

ARGUMENT

I.

SERVICE ON VWoA AS AGENT OF VWAG COMPLIES WITH DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

There is no question that service of process in this case met the due process requirements of our federal Constitution. Those requirements were enunciated by this Court in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940):

> That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court in *McDonald v. Mabee* [citation omitted], despite earlier limitations to the contrary. [citations omitted]. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [citation omitted] implicit in due process are satisfied.

It is equally well settled that the agent for service need not be expressly appointed by the defendant. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855); Burdick, *Service as a Requirement of Due Process in Actions in Personam*, 20 Mich.L.Rev. 422 (1922). There is no question in the instant case that under Illinois law VWoA is properly the agent for service of process on VWAG. Indeed, the factual findings of the Illinois Appellate Court regarding the close relationship between VWAG and VWoA have not been challenged by VWAG in this appeal. Thus, the underlying theme of its argument - the perceived injustice in permitting service upon it through an entity which it has not formally designated as its agent - is nothing but a smokescreen and is premised on the suggestion that VWAG, and VWAG alone, has a right to determine agency rather than appointment by operation of law, an appointment which

VWAG voluntarily accepts by its presence in this country. To give such authority to VWAG would be to grant them an exclusive privilege denied our domestic corporations. Accordingly, respondent submits the following description of the relationship between VWAG and VWoA in an effort to demonstrate that it was not through "blind luck" that VWAG filed a timely appearance in this matter and that service under the circumstances of this case comports with due process of law.

A. The Relationship Between VWAG And VWoA Assured That Service Upon VWoA Would Result In Notice To VWAG.

An examination of the relationship established by VWAG between itself and the wholly-owned subsidiary it created in order to market its "German engineering" "the Volkswagen way" in this country, leaves no doubt that VWoA is properly considered the agent of VWAG.[3]

VWAG is the parent of VWoA and owns 100% of VWoA's stock. (R. 172). In addition, VWAG exercises control over VWoA through interlocking directorships and through its blueprint for VWoA's operation - the importer agreement. For nearly thirty years, VWAG and VWoA have operated pursuant to a written importer agreement. (R. 390-461, 230-261). As late as 1983, this agreement contained broad explicit control by VWAG over VWoA. (R. 422-461). Indeed, based upon the 1974 agreement (which was in full force until replaced by the August, 1983 agreement), the Alabama Supreme Court, the United States District Court for South Carolina, and the United States District Court for the Southern District

[3] As demonstrated in Lodging Exhibit A, VWAG is well aware that German engineering is one of the selling points for Volkswagen cars in America. In addition, while the advertisements of other foreign automobile manufacturers refer specifically to their wholly-owned American subsidiaries, Volkswagen makes no such distinction.

of Florida, all found that the control of VWAG over VWoA was so pervasive as to render VWoA the agent for service of process upon VWAG. *Ex-Parte, Volkswagenwerk Aktiengesellschaft*, 443 So.2d 880 (Ala. 1983); *Roorda v. Volkswagenwerk, A.G.*, 481 F.Supp. 868 (D.S.C. 1979); *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95 (S.D. Fla. 1985).

The August, 1983 revision to the importer agreement was obviously made in response to the 1979 decision of the *Roorda* court. In this agreement, VWAG tries to avoid some of the explicit language regarding its control over VWoA and unsuccessfully purports to leave more to the discretion of VWoA. But, we submit, regardless of the language changes, the relationship between the two companies is totally unchanged from the 1974 agreement. To begin with, although various matters are now purportedly left to the discretion of VWoA, in fact, the real authority still resides in VWAG. The majority of the Board of Directors of VWoA is comprised of West German residents who are also members of the Board of Management of VWAG. (R. 376-388). Thus, in reality, policy decisions for VWoA are still being made in West Germany as they were under the earlier importer agreements, and not in the United States. Furthermore, despite the language changes between the 1974 and 1983 agreements, VWAG continues to retain substantial control over VWoA pursuant to the agreement.

As before, the non-transferable importer agreement explicitly establishes VWoA as the marketing arm of VWAG in the continental United States and Hawaii. (R. 232-233, 251). As such, VWoA must promote the image of VWAG, protect its service and trademarks (even to the extent of prosecuting suits in VWAG's name), and supply products and service under designations specified by VWAG. (R. 233, 238, 239).

Under the 1983 agreement, VWAG continues to provide, to such extent as VWAG deems appropriate, marketing assistance and advice to VWoA. (R. 235-237). This includes sales summaries compiled by VWAG which are to be used by VWoA in establishing and equipping its sales network. (R. 237, 241). VWoA is required to consult with VWAG in establishing its "Contractual Enterprises" (dealerships), and in setting its sales objectives. (R. 241). VWAG determines the contractual products to be distributed by VWoA. (R. 233). VWoA is barred from making any modification of the product. (R. 235). VWAG has complete discretion as to the warranty terms to be made by VWoA to purchasers of the product, and VWoA must service all Volkswagen products whether sold in its territory or elsewhere. (R. 244, 246, 261). VWAG "offers" to train VWoA personnel in the VWAG "Business Management System", and requires VWoA to advise its dealerships of "Volkswagen standardized programs". (R. 245).

The individual dealerships maintained by VWoA are also subject to a number of standards. First, VWoA must obtain VWAG's approval before allowing any dealership to use the Volkswagen name or trademarks. (R. 238). The dealership premises must conform with VWAG's "identification program", and the services and products offered must be sold under the designations specified by VWAG. (R. 239). The importer agreement also sets standards for conducting of business not directly relating to the sale of Volkswagen products. Standards are set for conducting used car sales and maintaining stock and stock levels. (R. 243-244). VWoA is also required to keep VWAG fully apprised of all aspects of its business. (R. 246).

VWAG's control of the relationship is further evident in the terms under which the products are "sold" from VWAG to VWoA. (R. 256-259). VWAG determines the method of ordering. VWAG may reject, with impunity, any orders from VWoA, but orders are always binding

upon VWoA. VWoA pays any price increase established by VWAG, even as to previously dispatched orders. Finally, VWAG has no liability to VWoA for early, late or even non-delivery of its product.

Even the provisions for termination of the agreement show VWAG's dominance in the relationship. VWoA is not even entitled to any damages upon breach or termination of the agreement. (R. 248-249). This is a one-way street running solely in favor of VWAG.

These terms alone show that the relationship between VWAG and VWoA is far more pervasive than the usual parent-subsidiary relationship. When viewed against the background of VWAG's ownership of 100% of the stock of VWoA and the fact that eight of the fourteen VWoA Directors are Directors of VWAG and residents of West Germany, conducting most of VWoA's Board Meetings in Wolfsburg, West Germany where VWAG's Board of Management meets (R. 376-388, 468), the agency relationship is even clearer.

But there is more.

The VWAG Annual Report also reflects the close ties between the two companies. (R. 263-367). While the 1983 importer agreement may couch VWAG's directives in discretionary terms, the VWAG Annual Report more explicitly reveals that VWAG exercises great dominance over its subsidiaries, including training of executives and other personnel based on VWAG concepts:

> There is more and more coordinated collaboration between the training departments at foreign subsidiaries and Volkswagenwerk AG . . . At the end of the year there were 1,525 trainees working for foreign-producing companies. Volkswagen [AG] was thus making a substantial contribution to overcome the current lack of jobs for trainees in the countries concerned. (R. 303).

VWoA, which does not publish an Annual Report, is

listed on a consolidated financial sheet for the VW Group. (R. 369-374). Production, performance, purchasing and dividends of VWoA are all detailed as a part of the world-wide network of the Volkswagen group.

In addition, particularly revealing is VWAG's assessment of the economic trends within the North American market:

> Our company [VWAG] too, which was the first **non-American** group to start up production in this region will be doing its utmost to increase its competitiveness even further. We are convinced that a reasonable position in this extremely important automobile market is of crucial significance for an independent automobile manufacturer. (R. 350) (emphasis added).

Clearly, VWAG views itself as directly participating in the North American market. It does so through VWoA.

Finally, the affidavit and testimony of Henry Wallace, who was qualified as an expert witness on the corporate structures of VWAG and VWoA and allowed to testify for the plaintiff on this precise issue in the case of *Donald MacCuish, Administrator v. Volkswagenwerk, A.G., et al.*, No. 80-2568, Massachusetts Superior Court, Middlesex County, further shows that VWAG controls the activities of VWoA to a substantial degree. (See Lodging Exhibits B and C). In addition to the examples already discussed, Mr. Wallace's testimony demonstrates the following instances of control:

> – VWoA is the registered agent for VWAG for the receipt of service of process under the National Traffic and Motor Vehicle Safety Act. Lodging Exhibit C, pg. 8 lines 7-13.
>
> – All testing and design responsibilities are controlled by VWAG. *Id.*, at pg. 9, lines 14-18.
>
> – VWAG controls the defense of lawsuits in the United States and they provide the experts in all cases, whether VWAG or VWoA is sued, and the case is controlled out of Wolfsburg, Germany. *Id.*, at pg. 10, lines 3-13.

> – VWoA cannot sue VWAG if VWAG does not perform pursuant to their distributorship contract. *Id.*, at pg. 12, lines 1-8.
>
> – VWAG controls advertising. *Id.*, at pg. 12, lines 9-10.
>
> – VWAG controls all copyrights and trademarks. *Id.*, at pg. 12, line 21.
>
> – VWAG controls the appointment and situs of all dealers and distributorships in the United States. *Id.*, at pg. 14, lines 3-10.
>
> – All the company forms, letterhead and other documentation which is used by VWoA is controlled by VWAG. *Id.*, at pg. 14, line 14.
>
> – VWAG controls the number of officers and employees which VWoA can hire. *Id.*, at pg. 14, line 20.
>
> – VWoA must have VWAG's approval before it can market vehicles in the United States. *Id.*, at pg. 15, lines 13-16.
>
> – VWoA must submit its financial statements yearly and interim statements to VWAG for their approval. *Id.*, at pg. 15, lines 21-22.
>
> – VWoA has sold over six and a half million German manufactured vehicles in the United States. *Id.*, at pg. 16, line 1.
>
> – VWoA cannot change the beneficial ownership of its corporate structure without the permission of VWAG. *Id.*, at pg. 19, lines 2-7.

Based upon all of these facts, it is not surprising that there is a great deal of uniformity among the courts which have considered this evidence in determining whether VWoA is the agent of VWAG for purposes of accepting service of process. (See: *Roorda, supra; Ex-Parte, Volkswagenwerk Aktiengesellschaft, supra; Lamb, supra; Luciano v. Garvey Volkswagen, Inc.*, No. 54603

(N.Y.App. October 29, 1987) (Lodging Exhibit D); *Donald MacCuish v. Volkswagen of America, Inc.*, No. 80-2568 (Mass. Superior Court No. 80-2568, February, 1984) (Lodging Exhibit E).

It is bewildering to conceive of a situation where VWoA, which carries out the dictates of management in West Germany, would fail to relay notice to its parent, VWAG. Having participated so intimately in the affairs of its subsidiary, and therefore, in the American marketplace, it is not for VWAG to determine whether it is subject to the jurisdiction of our courts. That determination is properly made by our courts within the confines of the due process guarantees of the United States Constitution.

Likewise, it is not for VWAG to determine whether it is subject to our laws regarding agency for service of process. VWAG has chosen not to appeal the factual findings of the Illinois court regarding its intimate relationship with VWoA. Having made this choice, VWAG must rest with the consequences.

II.

THE HAGUE CONVENTION ON SERVICE OF PROCESS ABROAD IS INAPPLICABLE TO SERVICE UPON AN AGENT OF A FOREIGN CORPORATION WITHIN THE UNITED STATES.

Service of process in this case is valid under both the laws of Illinois and the due process requirements of the federal Constitution, and having been accomplished within the sovereign borders of our nation, such service is not subject to the provisions of the Service Convention. In its brief to this Court, VWAG has attempted to draw from well-settled principles of law (*i.e.*, the supremacy of treaties in the United States and rules for treaty interpretation), a new multi-national uniform law for the determination of corporate presence and due process of law. Respondent respectfully submits that the uniformity petitioner seeks,

while perhaps serving the conveniences of the business in our country, is not intended by either the letter or spirit of the Hague Convention on Service of Process Abroad.

In the recent case of *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 107 S.Ct. 2542, 2550 (1987), this Court had occasion to interpret The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, and in so doing, reviewed the well-established rules of treaty interpretation.

> In interpreting an international treaty, we are mindful that it is "in the nature of a contract between nations," *Transworld Airlines Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), to which "[g]eneral rules of construction apply." *Id.*, at 262. See *Ware v. Hylton*, 3 Dall. 199, 240-241 (1796) (opinion of Chase, J.). We therefore begin "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). The treaty's history, "'the negotiations and the practical construction adopted by the parties'" may also be relevant. *Id.*, at 396 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943)).

Consideration of these factors clearly demonstrates that the Service Convention, although mandatory for service of process in foreign lands, is inapplicable to service upon a foreign national within the United States.

A. The Plain Language Of The Convention Renders It Inapplicable To The Case At Bar.

Petitioner would have this Court rewrite the "Convention on Service Abroad" into the "Convention On Service Upon Foreign Nationals". The approach taken by the petitioner is to suggest that we look closely at the "plain language of the Convention" while using a "liberal construction of the treaty as a whole." (Pet. br. 13, 34). While this is generally the rule for treaty interpretation, as used by

the petitioner it becomes the old "I want my cake and I'll eat it, too" argument. Never has such "plain language" been so violently twisted as it has been in this instance by the petitioner and its *amici*. Article I of The Convention states:

> The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra-judicial document for service abroad.

If, as petitioner argues, there is always an occasion for said transmission when foreign nationals are involved (Pet. br. 13; Brief of Mtr. Veh. Mfr. Assoc. as Amicus Curiae at 11), Article I would have omitted the adverbial clause "where there is occasion to transmit a judicial or extra-judicial document for service abroad" which modifies the words "shall apply." Instead, the Convention would have expressly stated:

> The present Convention shall apply in all cases, in civil or commercial matters, involving foreign nationals.

Petitioner thus seeks to do the following: liberally throw out the modifier which was deliberately inserted by the drafters of the Convention, strictly construe that which is left, and then give this new Convention a "liberal" application beyond the express intent evident in the original language. Petitioner suggests that if a "channel of transmission" is not expressly provided for in the Convention, then none exists. (Pet. br. 27). Yet, petitioner ignores the express provisions and the express language of those provisions which clearly state that the Convention is to be used only "where there is occasion to transmit. . . ."

Ultimately, the title and the individual Articles of the Convention leave no doubt as to its intended scope. As concisely noted by the Federal District Court in Florida:

> By its terms, the Hague Convention is applicable only to attempts to serve process in foreign

> countries. Both the introduction and Article I refer to the transmission of judicial documents, in civil matters, for service ABROAD. The purpose of the Hague Convention is to simplify the procedure for serving judicial documents abroad to ensure that the party to be served in the foreign country will receive notice in timely fashion. **There is nowhere among the provisions of the Hague Convention any indication that it is to control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin.** To ask a Court to find such an indication within the meaning of the Convention's language is to ask that a new treaty be fashioned by the Court. A Court may interpret but should not write the law. If the service of process in the instant case had been attempted directly on VWAG in the Federal Republic of Germany, then the provisions of the Hague Convention would have to be complied with. In this case, however, service of process was entirely accomplished within the United States by serving [VWoA] the agent of the defendant, VWAG; the provisions of the Hague Convention are simply inapplicable. *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 97 (S.D. Fla. 1985) (emphasis added).

The logic of the *Lamb* court on this issue is, we submit, compelling. The Illinois Appellate Court was clearly correct in reaching the same result in the instant case.

In *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985), the same conclusion was reached in a case involving service upon the Illinois agent of a wholly-owned subsidiary of a Japanese corporation.

> By its terms "the Hague Convention is applicable only to attempts to serve process in foreign countries . . . [it does not] control attempts to serve process on foreign corporations or agents of foreign corporations within the State of origin." *Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 97 (S.D. Fla. 1985). In *Lamb*, as in this case, service of process was entirely accomplished within

> the United States by serving the agent of the foreign defendant. The court found that the Hague Convention was inapplicable in determining the validity of service of process under the common law agency theory when the foreign corporation or its agent is located and served within the United States. Since we have held that FMI is the agent of Fujitsu Ltd. for the purpose of effecting valid service of process on Fujitsu Ltd., the only real question is whether service, as attempted, is sufficient under Rule 4. *Zisman*, 106 F.R.D. 194 at 199-200.

The court in *McHugh v. International Components*, 118 Misc.2d 489, 461 N.Y.S.2d 166 (1983), also held the Convention inapplicable to service upon an agent of a foreign defendant found within the United States:

> Assuming for the moment that for jurisdictional purposes, Marcon Japan and Marcon America are the same entity *(see, Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322), Marcon Japan's reliance on the "Hague Convention" is misplaced. The purpose of that treaty, as is clearly set forth in its title and declarations, is for assuring sufficient notice when service is made in a foreign country. *McHugh*, 461 N.Y.S.2d at 167.

Since the ruling in the instant case, the issue has also been considered by the Appellate Division of the New York Supreme Court. In *Luciano v. Garvey Volkswagen, Inc.*, No. 54603 (October 29, 1987) (slip opinion p.3, Lodging Exhibit D), the New York court stated:

> The Convention simply does not require that all citizens of the signatory nation be served according to its methods, as it does not state when service abroad is required but only how it is to be effectuated. Since the Convention does not purport to regulate the jurisdiction of the courts of the contracting States, such a purpose should not be read into an international treaty [citation omitted] we reject VWAG's contention that domestic service upon a foreign national has been rendered invalid by the Convention.

In addressing the Hague Evidence Convention, this Court recently noted:

> "The great object of an international agreement is to define the common ground between sovereign nations. Given the gulf in language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." *Trans World Airlines, Inc. v. Franklin Mint Corp*, 466 U.S. 243, 262 (1984) (STEVENS, J. dissenting). The utter absence in the Hague [Evidence] Convention of an exclusivity provision has an obvious explanation: The contracting States did not agree that its procedures were to be exclusive. *Aerospatiale*, 107 S.Ct. at 2552, fn. 23.[4]

Similarly, in the case at bar, the utter absence in the Service Convention of any reference to domestic service upon agents of foreign nationals also has an obvious explanation: the contracting States never agreed that the procedures would apply when a foreign national, or an agent thereof reasonably calculated to relay information to its principal, was found within the forum State. Surely, if any curtailment of rights currently afforded American litigants was intended by the parties to the Convention, such an intention would have been clearly and precisely identified

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[4] From this Court's reference in *Aerospatiale* to the exclusive nature of the Service Convention, petitioner attempts to manufacture a conflict between the holding of the Illinois Appellate Court in the instant case and this Court's holding in *Aerospatiale*. Petitioner's argument, however, begs the question. There is no issue as to the obligatory nature of the Convention when service is made abroad, within the boundaries of a signatory nation. The issue here is whether the Convention is applicable to service upon a foreign national, or its legal agent, within the sovereign boundaries of the United States. On that issue, VWAG's own counsel admitted at the oral argument of the motion to quash that the Convention would not apply if VWAG had been served through an appointed agent within the United States. (Tr. 8/26/85 p. 3).

in the treaty's crucial terms. *See: Aerospatiale*, 107 S.Ct. at 2553; *Maximov v. United States*, 373 U.S. 49, 54 (1963). It boggles the mind to imagine that the United States ever intended to bargain away the safeguards of due process already in use in this country.

Confronted with such unambiguous language, petitioner ultimately resorts to a theory that the internal communication of notice from VWoA to VWAG without transmission through the Central Authority somehow constituted "service" which infringed upon the sovereignty of the Federal Republic of Germany. (Pet. br. at 30).[5] That argument is without merit for two obvious reasons.

First, under Illinois law, service was accomplished when the summons and complaint were served upon VWoA. Ill.Rev.Stat. ch. 110 Sec 2-204. Thus, even if VWoA physically transmitted the summons and complaint to its parent, there was no "service abroad."

Second, the West German government has made it clear that documents mailed to recipients within West Germany for informational purposes do not fall under the requirements of the Service Convention. Bruno Ristau, who was then Chief of the Foreign Litigation Unit, Civil Division, Department of Justice and the U.S. Delegate to the Special Commission of Experts convened by the Hague Conference on Private International Law in 1977 for purposes of studying the operation of the Service Convention and problems which had arisen in its application,

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[5] Assuming, *arguendo*, that any affront to the sovereignty of the Federal Republic of Germany occurred, in point of fact, it was VWoA, not respondent, which chose to avoid the Central Authority. Thus, any argument that there was an affront to the sovereignty of the Federal Republic of Germany based upon the forwarding of the documents by VWoA to VWAG is specious and misleading to the extent that such actions have to do with internal communications and have nothing to do with the procedures followed by the respondent in the course of service of process.

reported as follows:

> The Swiss and German observers indicated that no objection would be raised in their countries if a copy of a legal document were mailed *strictly for information purposes*, as long as no legal consequences flow in the sending State from such mailing.

Nash, *Contemporary Practice of the United States Relating to International Law*, 72 Am. J. Int'l. L. 620, at 634-635 (1978) (emphasis in original).

No matter what the form of VWoA's report to its parent, it was clearly not to "serve" but to inform of a service which had already been perfected. Under our concepts of due process, service upon VWAG was effective upon receipt of the documents by its agent. The Service Convention was not intended to alter in any way that fundamental standard of United States law.

B. The Legislative History Of The Service Convention Supports The Appellate Court's Holding That The Convention Is Inapplicable To Service Upon The American Agent Of A Foreign Corporation.

The legislative history of the treaty makes pellucidly plain that the prime purpose of the treaty was to obtain judicial assistance in serving process abroad - not to work a change in the already high standards for notice which existed under United States law. The Convention was presented to Congress as an additional resource and "useful tool" - available when service could not be accomplished within this country. It is likewise a resource that is available to parties in all countries. The fact that within West Germany it is the only method for service of a foreign national (Brief of Fed. Rep. Ger. as Amicus Curiae at 13-14) is their internal decision and should have no influence on our procedures.

In transmitting the Convention to the Senate, President Lyndon B. Johnson stated:

> [T]he Convention makes important changes in the practices of many civil law countries, moving those practices in the direction of our generous system of international judicial assistance and our concept of due process in the service of documents.

Bevans, *Contemporary Practice of The United States Relating to International Law*, 61 Am. J. Int'l. L. 796, at 800 (1967).

The Convention was then considered by the Senate Committee on Foreign Relations which incorporated in its Executive Report to the Senate the following testimony received in support of the Convention from Richard D. Kearney, Deputy Legal Advisor, Department of State, Joe C. Barrett, Attorney at Law, and Philip W. Amram, United States Representative to the Tenth Session of the Hague Conference on Private International Law. That testimony again assured Congress that no major change in the American legal system would be wrought by the Convention.

Mr. Kearney, speaking on behalf of the State Department, stated:

> Unanimous agreement was reached upon a convention which basically conforms to the American standards of procedural due process and which provides a high degree of assurance that if an American citizen in the United States is sued in the courts of a state party to this treaty, he will be notified of the suit in sufficient time to enable him to defend the action. The obverse is also true. If a person outside the United States is sued in one of our courts, the necessary steps must be taken to ensure that he will be notified of the action and afforded an opportunity to defend. Such a requirement, of course, already exists in the United States under the due process clause of the Constitution. S. Exec. Rep. No. 6, 90th Cong., 1st Sess. App. 6-7 (1967).

Mr. Barrett, appearing as a commissioner on uniform State laws, noted the difficulties raised by attempts to

establish uniform procedures in private international law:

> Unifying and harmonizing private international law is an infinitely more difficult task for us in the United States than for most countries because of our federated form of government. Only the President with the advice and consent of the Senate possesses treaty-making power. Both the President and this body do, and should, exercise restraint in the use of that power where the legal effect of such exercise would result in marked changes in legal principles traditionally, if not constitutionally, falling within the domain of the several States. I consider it important therefore for you to understand what effect the Convention now under consideration would have on State law.
>
> * * *
>
> It is my opinion therefore that this Convention does not invade the domain of State law in the United States. On the contrary, it gives to our people, whether litigating rights in State or Federal courts, a very useful tool in furthering a fair determination of their rights, where nationals of other contracting countries are involved that would otherwise not be available to them. *Id.* at App. 8-9

Philip W. Amram again emphasized that, far from altering our service laws, the goal of the Convention was to improve the chances that those served in foreign lands would receive notice and have an opportunity to defend.

> The convention, however, goes farther than international judicial assistance in the service of documents. It also recognizes the concept of due process in international litigation where the defendant is a resident of a foreign country. Here the convention in my opinion is even more revolutionary in the changes required in many civil-law countries, while at the same time it leaves our common-law due-process principles unaffected and unchanged.
>
> This dual purpose in the Convention is stated clearly in the preamble. The first and primary

purpose stated is the due-process purpose, to -

> create appropriate means to ensure that judicial and extra-judicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time.

The international judicial assistance function is then stated as part of the due-process concept; namely to -

> improve the organisation of mutual judicial assistance *for that purpose* by simplifying and expediting the procedure.
>
> * * *
>
> The United States already provides the fullest due-process protection to foreign defendants in U.S. litigation. From the point of view of the U.S. delegation, we greet with pleasure the offer of any other state to mold its procedures in the direction of our concepts of due process. *Id.* at App. 11, 15.

Clearly, the legislative history of the Convention reveals that Congress did not contemplate the sweeping change to our internal law proposed by the petitioner in this case.

C. The Purpose Of The Convention Is To Assure Notice. The Appellate Court's Decision That The Hague Convention Did Not Apply To Domestic Service Does Not Undermine That Purpose.

The purpose of the Hague Convention on Service Abroad, as revealed in its plain language and legislative history, is to establish a system of judicial assistance with the goal of affording notice to parties sued in foreign lands. In this case, it is not even contested that VWAG received timely and sufficient notice. VWAG appeared within the time period allowed by the summons and responded to the pleading with a motion to quash. It does not, and cannot, argue that it was in any way blind-sided in this suit.

The Convention was not meant to give to the petitioner, or any foreign corporation, advantages not enjoyed by

domestic corporations. As this Court noted in *Aerospatiale:*

> Petitioners made a voluntary decision to market the products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. *Aerospatiale*, 107 S.Ct. at 2553-2554, note 25.

This concept is equally applicable here. VWAG made a voluntary decision to market its cars in the United States. It directs and controls VWoA with regard to major aspects of VWoA's operations. The Illinois court unquestionably had in personam jurisdiction over both VWoA and VWAG. VWAG is therefore subject to the same burdens associated with American judicial procedures as its American competitors. There is nothing in either the language or legislative history of the convention which lends itself to, much less compels, a finding that the purpose of the convention is at odds with domestic service which meets the notice requirements of due process of law.

The holding of the Illinois Appellate Court should be affirmed.

D. Petitioner's Speculation As To The Effect Of Upholding The Decision Of The Illinois Appellate Court With Regard To Service Is Unreasonable And Should Be Ignored.

Interestingly, although petitioner and its *amici* in the *Aerospatiale* case urged this Court to focus only on the case at hand and not on potential problems not before the Court (Brief of VWAG, Mtr. Veh. Mfr. Assoc. & Prod. Liab. Adv. Coun. as Amici Curiae, *Aerospatiale*, 85-1695, at 6), in this case these same parties indulge in a series of arguments based upon wild and unreasonable speculations which are clearly not before this Court.

First, petitioner's argument that without the application of Articles 15 and 16 of the Convention it will have no protection against unfair default judgments is totally without merit. It is offensive to suggest that absent Articles 15 and 16 of the Convention there is no judicial system of due process to protect the petitioner from unfair default judgments. In fact, two hundred years of Constitutional law preserves those very principles and provide the procedural guarantees about which the petitioner so quivers. *Pennoyer v. Neff*, 95 U.S. 714 (1877); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

In an even bigger quantum leap in logic, petitioner also asserts that the Appellate Court's decision to affirm service which complies with the due process guarantees of the United States Constitution "revives in a single stroke one of the principal evils that the Convention sought to eliminate – *notification au parquet*". (Pet. br. p. 32). The analogy is a false one, and the argument itself nothing more than the same saber rattling which this Court rejected from this petitioner and its *amici* in *Aerospatiale* case.[6]

Clearly, as evidenced by the legislative history, it was not the intent of our government in enacting The Convention On Service Abroad to have it render invalid service on foreign nationals or their agents within the United States which otherwise meets our high standards of due process of law. Because of the protection afforded under our constitution, petitioner, and other foreign nationals closely controlling agents in this country will never be blind-sided by a judgment about which they knew nothing. It is because of these benefits and protections of our laws that foreign

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[6] See Brief for the Motor Vehicle Manufacturer's Association of the U.S. Inc., Product Liability Advisory Council, Inc. and Volkswagen AG as Amici Curiae in Support of Petitioners, *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, No. 85-1695 at 4.

nationals choose to do business in our country.

Unlike service upon an agent which is reasonably calculated to give notice to the defendant, *notification au parquet* was a system in which actual notice was barely a consideration. Unlike American systems of service, *notification au parquet* did not require any showing of contact between the defendant and the forum. It was, therefore, one of the prime evils specifically addressed by the drafters of the Convention. Philip Amram, in his testimony before Congress, distinguished the *notification au parquet* system from American concepts of due process of law:

> The *notification au parquet* system has no relation to our "long-arm" statutes, with which we are all familiar in automobile accident litigation. The Supreme Court of the United States and the Supreme Courts of the individual States have marked out the constitutional due-process boundary lines of these statutes. They have fixed the need for the defendant's connection with the forum and the propriety of asking him to defend himself in the forum. They have fixed the need for the forum and content of the defendant's notice and knowledge of the proceedings and the opportunity to defend himself in due time. Finally, they have fixed the need to permit timely motions to be made to open default judgments where there is a real defense and where the defendant has not been guilty of delay.
>
> There are no such limitations and protections under the *notification au parquet* system. Here, jurisdiction lies merely if the plaintiff is a local national; nothing more is needed. S. Exec. Rep. No. 6, 90th Cong., 1st Sess. App. 12 (1967).

Petitioner's assertion that such a system will be reinstated by foreign governments if our country continues to recognize a form of internal service which is reasonably calculated to give notice to a defendant is pure speculation. It is simply not logical that, given the Convention's prime goal of assuring notice, foreign nations will retaliate with

service *au parquet* if, as here, their corporations receive timely notice of a suit through a wholly-owned and controlled subsidiary which is physically present in this country. As discussed in Section I of this brief, we are not dealing here with a foreign national who has committed a tort and then left our shores and returned to West Germany. If we were, the Convention would surely be the only means of service. VWAG is present in the United States in the form of a wholly-owned subsidiary whose affairs it has chosen to closely control.[7]

Ultimately, one would hope that international law is not premised, as VWAG intimates, on a " tit for tat" system. If it were, West Germany's violation of the provisions of the Convention in reviewing merits of litigation and refusing to serve complaints requesting punitive damages, would presumably have led to extreme consequences by the United States. (See, affidavit of Kevin Culhane, Lodging of Respondent made in Response to Petition for Certiorari). Fortunately, we can all be grateful that we instead rely upon the principles of international comity which make speculation of this sort unnecessary.

Finally, two other fallacious arguments must be addressed. First, only by suspending all sense of reality can one accept petitioner's concern over receiving information in the English language. Are we to assume that all communications between VWoA and VWAG are in

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[7] While respondent does not believe the issue is before this Court, petitioner's attempts to equate *notification au parquet* with service through a Secretary of State must be addressed. On the one hand, *notification au parquet* was a system which failed to require any showing of a connection between the defendant and the forum. On the other hand, Secretary of State service requires a showing of continuous and systematic business activities within the forum prior to the appointment by operation of law of an agent for the defendant. In fact, our concepts of fair play and substantial justice would preclude *notification au parquet* in Illinois or any other State.

German? The reality for a multi-national corporation such as VWAG is that it regularly deals with complex business relationships in this country in the English language. Witness the sophistication required to draft and redraft the VWAG importer agreement in efforts to evade American agency law, not to mention the achievements the petitioner has wrought thus far in bringing its arguments before this Court. For VWAG to speculate that it may not understand the import of a legal document relayed to it by its subsidiary is not only contrary to the actual events in this case but borders on the absurd. *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 4, 9 (S.D.N.Y. 1975).

Likewise, petitioner's thinly veiled threats regarding the enforceability of the judgment is not a proper basis for determining the validity of service. That is a question to be addressed if and when respondent may seek to enforce, in West Germany, any judgment which is rendered in his favor. Given the enormous volume of business conducted by VWAG in this country and the large profit reaped therefrom, respondent may very well find sufficient assets in the United States to satisfy any judgment entered against VWAG. *Hunt*, 410 F.Supp. at 9-10.

III.

SERVICE IN THIS CASE DOES NOT OFFEND CONCEPTS OF INTERNATIONAL COMITY

As previously discussed, respondent does not believe that there has been any violation of the judicial sovereignty of the Federal Republic of Germany. Indeed, the perception of a violation of judicial sovereignty relies upon the misconception that the Service Convention is an exclusive method for service of process upon foreign nationals regardless of their presence in the forum state. Clearly, such is not the case.

To the extent that petitioner and the West German government continue to present abstract arguments

regarding judicial sovereignty and international comity, these arguments do not render service invalid. In the instant case, petitioner has voluntarily entered the United States market and is competing with United States domestic corporations. One of its cars has now contributed to the death of the Respondent's parents. Given these facts, an abstract claim of judicial sovereignty cannot justify the granting of an "extraordinary privilege – to have all of the benefits of access to American markets, yet to be free from the burdens that American judicial procedures generally impose." (Brief of Solicitor General at 23, *Aerospatiale*, 85-1695) (Discussing foreign objections to discovery requests directed to its citizens).

The proper approach to such claims, as enunciated by this Court in the *Aerospatiale* case, is to deal with such claims on a case-by-case basis, weighing the respective interests. *Aerospatiale*, 107 S.Ct. at 2555-2556. Clearly, when such an analysis is made here, the balance overwhelmingly favors the proposition that a German corporation voluntarily doing business here through a subsidiary it created, owns and chooses to closely control, is amenable, like any United States corporation, to the jurisdiction of our courts and to service through that subsidiary. Indeed, having taken advantage of the benefits and protections of our laws, VWAG should not be allowed to evade the requirements of those laws by false claims of exclusivity and feigned claims of offended sovereignty.

The decision of the Illinois Appellate Court should be affirmed.

CONCLUSION

Petitioner asks this Court to rewrite an unambiguous treaty aimed at assuring fair notice to litigants similar to our due process guarantees for no better reason than its own convenience. The Service Convention is, by its unambiguous terms, not applicable to service within the United States on an agent of a foreign corporation who is reasonably expected to provide notice to the defendant. The decision of the Appellate Court does not render the Convention meaningless; rather, it puts the Convention in its proper perspective as a resource available to each of its signatories when it becomes necessary to serve a foreign national who has not left an agent upon its shores.

Service here met with all requirements of due process of law and the decision of the Illinois Appellate Court upholding the service should be affirmed.

Respectfully submitted,

JACK SAMUEL RING
Counsel of Record
JUDITH E. FORS

JACK SAMUEL RING & ASSOCIATES, LTD.
69 W. Washington Street
Chicago, Illinois 60602
(312) 782-5462

Counsel for Respondent

January, 1988

REPLY

BRIEF

No. 86-1052

In the Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation, PETITIONER

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of
FRANZ J. SCHLUNK and SYLVIA SCHLUNK, RESPONDENTS

**On Writ of Certiorari to the
Appellate Court of Illinois, First District**

REPLY BRIEF FOR THE PETITIONER

HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005

JAMES K. TOOHEY
Ross & Hardies
150 N. Michigan Avenue
Chicago, IL 60601

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Despite the thrust of the briefs filed by respondent and his private *amici curiae* in this case, there is no question here of a foreign national evading Illinois jurisdiction or denying plaintiff a day in court or operating in the United States via some corporate subterfuge. Nor, contrary to respondent's repeated suggestions, does this case involve service on a foreign defendant that "is present in the United States" (Resp. Br. 28). Respondent's attempt to direct the Court's attention to these false and patently irrelevant issues should not be allowed to obscure the important question presented.

This case concerns the applicability of an international treaty to the service of process upon a defendant concededly *not* present in the United States. Even the Illinois Appellate Court's decision, which designated VWoA as an involuntary agent of VWAG for the receipt of a summons and complaint, was based upon the state court's express expectation that VWoA would transmit the service documents to VWAG *in Germany*. Pet. App. 17a. Similarly, the other courts that have been willing to allow plaintiffs to bypass the Hague Service Convention's mandatory service requirements have agreed with this basic concept. See, *e.g.*, *Lamb*, 104 F.R.D. at 101 (the domestic subsidiary must "turn over the process served on it" to its foreign parent corporation); *Ex parte Volkswagenwerk A.G.*, 443 So. 2d at 885 ("the subsidiary will turn over the process to the defendant parent").

This assumption—that process will somehow be transmitted *abroad*—sets the stage for the present dispute. This Court's decision in *Aerospatiale* articulates the unquestionable proposition that the Hague Service Convention is "mandatory" in "all cases" where "there is occasion to transmit a judicial . . . document for service abroad." The dispute here centers on whether the treaty covers process concededly intended by the state courts to

be transmitted "abroad" even though the "first drop" occurs locally pursuant to state-created fictions of involuntary "agency." The core issue is one of treaty construction and federal law, not state law concepts of imputed "agency." Five nations that are parties to the Convention (Germany, Great Britain, France, Japan and Belgium) have unequivocally stated that the Convention applies in this situation. See App., *infra*, 1a-15a. The United States, on the other hand, has taken the position that the Convention *should* be used here—indeed, in its *amicus curiae* briefs it strongly encourages resort to the Convention—but nevertheless concludes that the Convention's requirements need not be followed in such circumstances.

The bottom-line position asserted in the Solicitor General's brief, however, is inconsistent in its interpretation of the treaty. For example, the Solicitor General concedes that substituted service upon a secretary of state violates the Convention because it requires the process to be transmitted abroad for due process purposes. Yet he stops short of condemning the ad hoc "involuntary agency" form of substituted service in this case despite the Illinois court's premise that such process delivered locally likewise will have to be transmitted "abroad."

This reply brief will point out why, as a matter of sound treaty construction, the Convention's language applies to the substituted service that occurred here. Far from encouraging use of the Convention, which the Solicitor General advocates, his interpretation would send a signal to domestic litigants and the world community that the treaty may be bypassed, thereby nullifying its protections and rendering United States judgments unenforceable abroad. Even worse, the protections now accorded American defendants haled into foreign courts may be compromised by resort to similar rationales. Finally, the availability of effective, reliable and desirable procedures for transnational service of process under the

treaty requires its utilization in deference to fundamental principles of comity.

ARGUMENT

I. SUBSTITUTED SERVICE ON AN INVOLUNTARY AGENT IS AS MUCH "SERVICE ABROAD" UNDER THE CONVENTION AS SUBSTITUTED SERVICE ON A SECRETARY OF STATE

A. The Solicitor General's Concessions

The Solicitor General concedes that the Hague Service Convention is "mandatory" where it applies (U.S. Br. 12 & n.11); that it has proven to be a "reliable" method for transnational service (*id.* at 9, 28); that failure to use the treaty will erect "serious obstacles" to "enforcing a United States judgment" (*id.* at 28 n.39); and that American plaintiffs should "avail themselves of the . . . Convention's internationally accepted procedures" in cases such as this one (*id.* at 28; see also *id.* at 9-10). Indeed, the Solicitor General "strongly encourages" use of the Convention in these cases (*id.* at 9-10, 28) and, in his brief at the petition stage, even questioned "the ultimate wisdom of respondent's decision to forgo use of the Convention" (U.S. Pet. Br. 19)—a mystery not answered at all by respondent's brief.

The Solicitor General also concedes the correctness of the main legal propositions relied on in our opening brief. In particular, he agrees that (1) the ultimate question whether there is "service abroad" is necessarily a federal law issue of "treaty construction" rather than one of "local law" (U.S. Br. 23); (2) if in fact there is service abroad "then it is the Convention procedures—and not whatever procedures are prescribed by state law—that must govern service" (*ibid.*); (3) *notification au parquet* is a "form of service abroad" even though the plaintiff serves pleadings on a domestic official under that system (*id.* at 25-26); and (4) service on a foreign defendant through a secretary of state constitutes "serv-

ice abroad" even though the original target of service is a domestic involuntary agent (*id.* at 26-27).

Most significantly, the Solicitor General acknowledges that common-law "agency" service upon a foreign defendant is subject to the Convention if notification must be relayed by the agent to the real defendant abroad. The Solicitor General agrees with our submission that "if in order to overcome due process objections the [involuntary agency] theory incorporates a legal requirement that the defendant be directly notified in order to complete service, then the theory would entail service abroad and would be subject to the Convention." U.S. Br. 27-28 (citation omitted).

Finally, the Solicitor General does not dispute our principal assertions about the practical effects of the decision below: (1) the treaty would not apply in a significant category of transnational litigation, because many corporations have foreign subsidiaries, distributors and business affiliates; (2) the fundamental purposes of the treaty—to assure translation of pleadings, a reasonable amount of time to respond, and protection against default judgments—would be nullified in many international disputes; (3) the treaty's protections would often hinge on the vagaries of local law, thereby defeating the predictability and uniformity the treaty was designed to achieve; and (4) *ad hoc* inquiries into imputed "agency" would burden the parties and the judicial system and adversely affect all litigants in the long run.

Taken together, these points of agreement come close to an outright concession of the correctness of our position. The Solicitor General nonetheless draws back from the logical implications of his analysis and ultimately contends that the Illinois court's decision is correct. He does so on the theory that the phrase "service abroad" in Article 1 of the Convention refers only to the "formal" delivery of judicial documents in the territory of another contracting nation (U.S. Br. 9).

B. The Solicitor General's Flawed Analysis

The Solicitor General arrives at his ultimate conclusion by confusing domestic law customs with appropriate treaty interpretation. But this case requires the Court to eschew provincialism and parochialism in construing a multinational agreement that constitutes both federal and international law. If Illinois procedures, however salutary from a domestic standpoint, conflict with the treaty, they must bow under the Supremacy Clause. In the face of these principles, the Solicitor General advocates a "pick and choose" approach under which he rightly condemns service on a secretary of state because such service requires transmittal abroad, while he erroneously sanctions service on an involuntary agent, which likewise requires transmittal abroad.

1. *Substituted service.* A principal defect in the Solicitor General's argument is his failure to appreciate the central premise of substituted service, which is the agent's transmittal of notice to the defendant so that he may defend himself. Our opening brief noted (at 22) that, absent reasonable assurance that service actually will be transmitted to the defendant abroad, service on a domestic "involuntary agent" violates the Due Process Clause. See *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940) (the adequacy of substituted service "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give [the defendant] *actual notice* of the proceedings and an opportunity to be heard") (emphasis added); *Wuchter* v. *Pizzutti*, 276 U.S. 13, 20 (1928) ("the state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued"). See also F. James & G. Hazard, *Civil Procedure* § 2.20, at 88 (3d ed. 1985).

Thus, contrary to the Solicitor General's suggestion (U.S. Br. 25), VWAG was entitled to an assured procedure of communication that the lawsuit had been com-

menced; due process presupposes that VWoA would relay, if not the summons and complaint themselves, then their substantial equivalents. VWAG had a right to precise notification of the proceeding, the specific charges against it, and the procedures it must follow to make a defense. See *Restatement (Second) of Judgments* § 2 & Comment b (1982). Consistent with the foregoing, the rationale of the Illinois Appellate Court in upholding the service on VWoA here was its express premise that the service documents would be transmitted to VWAG in Germany (Pet. App. 17a).

The Solicitor General acknowledges that secretary of state service is not "complete" within the state, because the state official "is obliged as a matter of law" to forward the documents to the defendant. U.S. Br. 27. It is for this reason that the Solicitor General concedes that secretary of state service on a foreign defendant—although taking place at least in part within the forum state—must be regarded as "service abroad" for purposes of the Convention. U.S. Br. 26. But the Solicitor General ignores the fact that substituted service on a corporation located abroad by delivering the papers to its domestic subsidiary implicates precisely the same due process requirements.

In other words, eventual transmittal of the domestically-delivered process "abroad" is really "an integral part of the legal requirements for effective service." U.S. Br. 27. The Illinois court's assumption that the "involuntary agent" chosen as the conduit will relay the pleadings across international boundaries to the defendant (Pet. App. 17a) is clear evidence that substituted service "would entail service abroad" under the very principles articulated by the Solicitor General (U.S. Br. 28).

2. *Notification au parquet.* Still another glaring example of an inconsistent "pick and choose" approach—markedly inappropriate for orderly construction of an important treaty—is the Solicitor General's treatment of

the prohibited form of substituted service known as *notification au parquet*.

If the Solicitor General's position here were correct, it would be impossible to understand why *notification au parquet* is governed by the Convention. The Solicitor General argues that *notification au parquet* is a form of "service abroad" under his theory because "the countries that used this service method had specified in their formal service rules that the documents had to be transmitted to the foreign defendant through diplomatic or postal channels." U.S. Br. 26. Apparently, the Solicitor General is suggesting that *au parquet* service was not "complete," to use his word, until the documents were transmitted abroad.

The Solicitor General's understanding of *notification au parquet*, however, is incorrect. It is absolutely clear that under *notification au parquet* the domestic law of many European countries treated "formal service" as having occurred totally *within* the forum state. For example, France expressly stated in the Convention negotiation history that where service is by *notification au parquet*, "[t]he summons is good from the date when the original copy is stamped by the public prosecutor's office. Later formalities (such as transmission of the document by diplomatic channels) are considered supplementary, rather than necessary." III *Actes et Documents*, *supra*, at 22. (The same held true for Luxembourg and the Netherlands. *Id.* at 45-46, 49-50.) The United States negotiator at the Hague Convention realized this as well. See Amram Statement, S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 12 (1967) (under *notification au parquet* "[s]ome effort is supposed to be made through the Foreign Office and through diplomatic channels to give the defendant notice, *but failure to do this has no effect on the validity of the service*") (emphasis added). Accord, 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)* § 4-33, at 172 (1986). None of the authorities cited by the Solicitor General (U.S. Br. 26 n.36)

comes close to supporting the claim that countries using *notification au parquet* required that service documents be sent to the foreign defendant. See *id.* at 12 n.9. In fact, as Mr. Loussouarn of France remarked: "One must recognize that if the official does not transmit [the documents], there is no sanction. . . . [T]he draft Convention remedies that." III *Actes et Documents*, *supra*, at 168-169.

In short, the drafters of the Convention uniformly understood that *au parquet* service was legally "complete" in the forum state upon delivery to the local agent, regardless of whether actual notice was sent to the foreign defendant overseas. Yet, as the Solicitor General is forced to acknowledge, "[t]he Convention's drafters clearly understood *notification au parquet* to be a form of service abroad." U.S. Br. 25-26. The consequences of this for the Solicitor General's argument are clear: the validity of local service methods under the Convention does *not* depend upon whether they are considered to be "complete" within the forum state under domestic law. Rather, the clear rejection of *notification au parquet* in the Convention is overwhelming evidence that the drafters intended the treaty to apply to *all* types of substituted service (whether or not formally "completed" domestically) in which the defendant would receive notice of the action only if process were transmitted to him abroad.

3. *The treaty's effect on American law.* The Solicitor General posits the strange proposition (U.S. Br. 17-20; see also Resp. Br. 21-24) that the Convention is a contract that somehow imposed limits only on foreign nations but not on the United States. He states that, prior to the Convention, "American courts regularly [allowed] service on a foreign corporation through in-state delivery of documents" to its domestic subsidiary (U.S. Br. 18) and that the Convention was intended to "make no major changes in existing American law" (*ibid.*). These statements are incorrect regarding the treaty's impact in this case.

To begin with, the Solicitor General's claim that the treaty was designed to leave domestic service practices totally unchanged is refuted by his admission that the Convention prohibited "the practice which has evolved in this country of serving an out-of-state defendant through the state secretary of state or other state officials" (U.S. Br. 26). In his *amicus curiae* brief at the petition stage, the Solicitor General correctly described this form of substituted service as "common." See U.S. Pet. Br. 9, 10 & n.16. The Solicitor General makes no effort to explain how the Convention could have left American law untouched while simultaneously prohibiting the most frequently used method of substituted service on out-of-state defendants.

It is true, of course, that American law has not been "changed" by the treaty in the sense used in most of the quotations relied on by the Solicitor General. The Convention required no implementing legislation here, nor did it erode or compromise the American concept of fair notice. The Convention, however, *refined* this general mandate of fair notice by prescribing detailed rules and orderly procedures that apply to the unique problems confronted by foreign defendants. These concessions by the United States were among the inducements for the concessions by the other parties.

The Solicitor General also has misdescribed the state of pre-Convention law in this country. Even with respect to wholly *domestic* companies, it was well established that a parent corporation could not be served simply by dumping process on its subsidiary. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), for example, the Court found that the defendant corporation "dominate[d]" its subsidiary "immediately and completely" (*id.* at 335) and used it as an "instrumentality for doing business" in the forum state (*id.* at 336), but it nonetheless held that the plaintiff could not sue the parent by serving the subsidiary, which was "a distinct corporate

entity" (*id.* at 335). To the extent that service of this kind has ever been approved, it has been on the assumption (as the Solicitor General pointed out in his *amicus curiae* brief at the petition stage) that the "in-state subsidiary . . . is charged with responsibility for transmitting process to the foreign corporation." U.S. Pet. Br. 10; see *International Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945). Because transmission to the parent-defendant is crucial to the constitutional validity of this type of service, it entails "service abroad" pursuant to the very principles espoused by the Solicitor General. U.S. Br. 27-28.

C. The Solicitor General's Failure to Confront The Treaty's Language, Intent and Policy

1. *The language of the Convention.* The Solicitor General's position conflicts with both the literal language and a common sense reading of Article 1. Although the Solicitor General focuses heavily on the isolated phrase "service abroad" in an attempt to show that "service" on VWAG took place in Illinois rather than "abroad" (see U.S. Br. 14-15), the Convention in fact provides that use of its procedures is mandatory whenever "there is *occasion to transmit* a judicial . . . document for service abroad." There can be little doubt that this case presents a situation falling within that language. Indeed, the Solicitor General acknowledges that there was an "occasion" for "service abroad" here by stating twice that respondent could and should have resorted to the Convention. See U.S. Br. 9-10, 28.

Moreover, there was "service abroad" in this case in every practical sense. VWAG is a separate defendant with its own legal rights. Only VWAG is able to defend its product design, and only VWAG is obligated to write a check for damages if it loses. Yet VWAG, a non-resident German defendant, has been forced to appear and defend itself in the courts of Illinois as a result of pleadings sent across international boundaries that did not comply with the Convention. It is an empty exercise

in semantics to say that the Convention may be bypassed just because the first step of the service of process took place in Illinois. As noted above, it was an essential part of the service of process—a part mandated by the Due Process Clause—that VWAG be notified of the charges alleged against it in the complaint. Given the manifest policies and purposes of the Convention, it hardly matters that the necessary documents were transmitted to Germany by VWoA, an involuntary conduit selected by respondent, rather than by respondent himself.

Thus, regardless of local law notions of "service," it is impossible to conclude that respondent's service on VWAG in Germany does not fall within the broad, generic language of the Convention, which extends to "all" cases where there is "occasion" to transmit documents for transnational service. It would be anomalous to construe the coverage of this treaty grudgingly when the contracting nations not only declared that it should be construed liberally but also went to such extraordinary lengths to prescribe a comprehensive table of rules governing every facet of international service. See Pet. App. 27a-44a.

2. *The treaty history.* The Solicitor General contends (U.S. Br. 16-17 & n.19) that the negotiating history of the Convention indicates that each nation's domestic law would determine whether service has occurred "abroad." Although it is true that the Reporter so understood early drafts of the Convention, he also protested that such a result would undermine the obligatory character of the treaty. See III *Actes et Documents*, *supra*, at 81, 254; U.S. Br. 17 n.19 (noting that the Reporter protested that this interpretation would "decrease[] the obligatory force of the Convention"). The Solicitor General completely ignores the fact that the drafters later agreed with and responded to the Reporter's criticism and, as a consequence, "profoundly altered" ("profondément altéré la rédaction") the final draft of the Convention to guarantee that it would have "mandatory" effect and that it would apply even where forum law would hold "service"

complete upon delivery of process to a domestic involuntary agent (as where "a State allows service to a person located abroad to be made *au parquet*"). See III *Actes et Documents*, *supra*, at 366-367.

In addition, the Solicitor General's revisionist view of the treaty history is wholly at odds with the drafters' intent to devise a workable regime resolving problems of transnational service. The Convention deals comprehensively with service by postal channels, consular officials, and other means of serving judicial documents on foreign defendants. See Pet. Br. 26. Yet the treaty gives no hint that it meant to countenance an alternative regime of transnational service through a myriad of imputed common-law "agents," such as corporate subsidiaries. Particularly since the drafters were well aware that foreign corporations often had relationships with a network of domestic subsidiaries and affiliates, it is impossible to believe that they would have simply failed to address the matter and thereby allowed a massive loophole to swallow up the treaty.

The Solicitor General acknowledges that American courts recognized various forms of "agency" service at the time the Convention was drafted (U.S. Br. 17). If in fact the American representatives believed that these methods of service could properly be used to relay pleadings across international borders outside the framework of the Convention, they surely would have made that known. It would be inconsistent with the principle of utmost good faith that applies to treaty construction for this Court now to create, for the first time, a gaping hole in the fabric of the treaty more than 20 years after its adoption. See *Restatement of Foreign Relations Law* § 326, Rep. Note 2 (Tent. Final Draft July 15, 1985) ("[c]ourts are more likely to defer to an executive interpretation already made in diplomatic negotiation with other countries . . . than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved.").

3. *The practices of other nations.* Equally erroneous is the Solicitor General's assertion (U.S. Br. 22 & n.31) that other Convention countries allow service on a foreign corporation to be made through a domestic subsidiary. The Solicitor General's reliance on *Acciaierie* and the quote from *International Co-Operation in Litigation: Europe* are obviously misplaced because they both deal with the situation prior to the Convention. And the *ICI* case, while more recent, concerns service of an administrative decision issued by the Commission of the European Communities in a criminal antitrust case. As the Solicitor General himself points out (U.S. Br. 12 & n.11), many contracting parties believe that such service is outside the Convention regime because it does not involve "civil or commercial matters." Beyond this, the Commission itself, as a supranational organization, is not a party to the Convention and is not bound by its requirements. Indeed, the Court of Justice allowed such service only because there was no available alternative method of serving process, such as the Convention.

In sum, the Solicitor General has not cited a single instance after the Convention came into force in which a contracting nation permitted service on a foreign corporation through its domestic subsidiary as a means to circumvent the Convention. If this Court were to affirm the decision below, the United States would stand alone.

4. *Frustration of the Convention's purposes.* We explained in our opening brief why our interpretation of the Convention would fulfill the treaty's two principal purposes, as set forth in the Preamble: to ensure that defendants sued in foreign courts receive notice in sufficient time to defend themselves, and to simplify and expedite procedures for mutual judicial assistance. Pet. App. 27a. Presumably, the Solicitor General agrees because he "strongly encourages" use of the treaty here. One of the more remarkable aspects of the Solicitor General's submission, however, is that he makes *no* effort to demonstrate that his reading of the Convention would be

equally effective in advancing these goals. This omission is not surprising, because the Solicitor General's bottom-line position would subvert both treaty objectives.

First, the Solicitor General's approach would guarantee continued uncertainty and inconsistency under an important international treaty. State and local judges across the country would have to determine in every case whether, under domestic law, the recipient of the judicial documents is a proper "involuntary agent" for service of process, as well as whether service is considered to be "complete" within the forum. The former question already has spawned substantial confusion among the lower courts, with inconsistent decisions being reached even on identical sets of facts. See Pet. Br. 39 & n.14. Litigation over the latter question promises to be at least as confusing, particularly when embellished with the ambiguous limitations now specified by the Solicitor General. U.S. Br. 23, 27-28.

It is ironic indeed that the Solicitor General would propose such an unworkable test, because he recommended that the Court grant certiorari in this case expressly to resolve the "considerable disarray among the lower courts" (U.S. Pet. Br. 13). He added (*id.* at 14-15) that:

> courts have reached divergent conclusions, with little accompanying explanation, when service is attempted upon a domestic subsidiary as the corporation's agent. This confusion on a fundamental procedural question has resulted in uncertainty and resulting hardships for foreign and domestic litigants.

Furthermore, the Solicitor General's approach would do nothing to ensure that foreign defendants receive process in sufficient time to defend themselves adequately. As we explained in our opening brief (at 40-43), and as the Solicitor General does not dispute, if the Convention could be circumvented by resort to an "involuntary agent" rationale, foreign defendants (especially multinational companies) would routinely be confronted with

receipt of untranslated documents days or even weeks after their time to respond had started to run. To make matters worse, as the Solicitor General concedes (U.S. Br. 15 n.16), his construction of Article 1 renders inapplicable the substantial protections against default judgments in Article 15 and 16 of the treaty whenever a local intermediary relays process abroad.

The Solicitor General's construction would, in fact, lead to truly bizarre results. The *more* protection a state sought to give foreign defendants, such as by requiring that an "involuntary agent" served domestically send the process abroad, the *less* the protection of the Convention would appear to be needed. Yet the Solicitor General's theory operates in precisely the opposite way. According to the Solicitor General:

- The Convention has no application, and offers no protection, when involuntary agency service is deemed to be "complete" within the forum state under local law. U.S. Br. 23-24.
- The Convention only becomes mandatory when local law already protects a foreign defendant by *requiring* transmission of process by a domestic agent, such as the secretary of state. U.S. Br. 26-27.
- On the other hand, the Convention purportedly is inapplicable when there is merely the "reasonable assurance" mandated by the Due Process Clause (*International Shoe*, 326 U.S. at 20)—but not a formal statutory requirement—that an "involuntary agent" will give the defendant actual notice of the pleadings. See U.S. Br. 21, 25.
- If there is not a reasonable assurance of actual notice to the defendant, due process would be violated, and a court order remedying the due process violation would simultaneously trigger the protections of the Convention. U.S. Br. 28 & n.38.

As a result, the Solicitor General's reading of the Convention renders it either useless or redundant in the

overwhelming majority of cases where foreign defendants are sued in the United States.

The Solicitor General admits these anomalous consequences. He nonetheless attempts to mask their importance by asserting that "the set of state substitute service practices that would both avoid due process infirmities and yet not entail service abroad is in reality quite small." U.S. Br. 28. In reality, however, the facts in this case are commonplace. They typify a large percentage of the cases that have arisen in this field. Beyond this, there are innumerable other situations in which it could be asserted that service on an imputed agent satisfies due process and therefore escapes the coverage of the Convention. Almost all businesses can be expected to transmit pleadings to their parents, siblings, partners, joint venturers and contractual affiliates abroad. The *Schermer* case, wrongly dismissed by the Solicitor General as an aberration (U.S. Br. 28 n.38), is only suggestive of the factual diversity of common law "agency" relationships.

Finally, the Solicitor General seeks to mitigate the anomalous consequences of his theory by asserting that, if substituted service were to violate due process, and if a court were to cure the constitutional violation by requiring that the foreign defendant be notified directly, that "cure . . . would trigger the procedural requirements of the Convention." U.S. Br. 28 n.38. But where, as here, due process presupposes that the pleadings will be transmitted abroad, and where in fact they *have* been so transmitted, the distinction drawn by the Solicitor General is simply arbitrary. It could not possibly be "in accordance with . . . the intent of the contracting nations" (U.S. Br. 1).

II. THE AVAILABILITY OF EFFECTIVE AND RELIABLE SERVICE PROCEDURES REQUIRES RESORT TO THE CONVENTION UNDER ESTABLISHED PRINCIPLES OF COMITY

Our initial brief (at 47-48) demonstrated that principles of comity require resort to the Convention in this

situation, an argument that respondent wholly fails to refute. See Resp. Br. 29-30. Nor has the Solicitor General disputed our suggestion that comity principles require use of the treaty. To the contrary, the United States "strongly encourages" use of the Convention in cases such as this. Thus, the sovereign interests of the United States are in fact aligned with those of at least five other contracting party nations (see App., *infra*) on the issue whether the Convention should be utilized here.

In *Aerospatiale*, this Court held that comity requires an analysis of "the respective interests of the foreign nation and the requesting nation" (107 S. Ct. at 2555) and stressed the need for "due respect" for "any sovereign interest expressed by a foreign state" (*id.* at 2557). As the concurring and dissenting Justices agreed, comity requires that "the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime" be carefully considered and weighed (*id.* at 2562) (Blackmun, J., concurring in part and dissenting in part).

Here, this comity analysis is straightforward and compelling. Germany, like other civil law nations, regards service of judicial documents on its nationals as a sovereign prerogative; it objects to attempted "substituted service" with a circuitous "relaying" of notification across its borders. Germany has protested the decision below because it "permits the 'involuntary agent' to usurp the sovereign function assigned by the Convention to the central authority, that is, to serve the complaint upon the defendant in Germany." FRG Br. 8. For its part, VWAG has explained its interest in upholding a method of service that permits it to supervise litigation in various parts of the world, a method of service deemed important by the international community. Pet. Br. 41-42. Other foreign defendants (including smaller companies and individuals) exposed to "substituted service" through a host of imputed agents and protected only by the generalized requirements of American due process would suffer even greater harm.

There is simply *nothing* to weigh on the other side of the scale. Respondent does not claim that it would have been burdensome, expensive, inefficient, or in any other respect inappropriate for him to have resorted to the Convention procedures. Resp. Br. 29-30. Similarly, neither Illinois nor the United States has advanced *any* sovereign interest in bypassing the Convention. To the contrary, the undisputed evidence shows that the Convention has operated with conspicuous success in large numbers of cases. Germany serves more than 600 complaints filed each year by American plaintiffs against German nationals under the Convention. FRG Br. 7-8. The United States serves more than 5,000 such complaints annually, including more than 1,600 complaints emanating from Germany. U.S. Br. 4 & n.3. There is no evidence that this program of international cooperation is not working exactly as anticipated.

The American Trial Lawyers Association (ATLA) volunteers (Am. Br. 15-17) that it may be difficult to mesh the Convention with the timing requirements of the Illinois civil rules. But the Chief Clerk of the Law Division of the Circuit Court of Cook County confirms that service is routinely made under the Convention simply by noting on the summons that a period longer than 30 days is applicable. Moreover, whatever minimal delays occur in effecting service under the Convention certainly pale in comparison to the delays inevitable under respondent's construction of the treaty, which would necessitate extensive litigation concerning the details of the principal-agent relationship in every case. There is even less merit to ATLA's anecdotal reference (ATLA Br. 16-17) to difficulties in making service of complaints containing punitive damages claims. The United States has agreed with Germany and other treaty parties that any "[d]ifficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels" (Art. 14, Pet. App. 31a), and discussions are now taking place on the punitive damages issue. More fundamentally, the present complaint contains no claim for punitive damages.

Accordingly, the Solicitor General is entirely correct when he reports that "the Convention procedures have proven to be a reliable and generally preferred method for service of process." He "strongly encourages American plaintiffs to avail themselves of the Hague Service Convention's internationally accepted procedures," particularly because of the "serious obstacles to obtaining foreign assistance in enforcing a United States judgment" created by "[f]ailure to employ the Convention's procedures." U.S. Br. at 28 & n.39. There is, in short, not even a colorable excuse for respondent's refusal to utilize the Convention here.

There is an undercurrent in respondent's brief (see Resp. Br. 3) that our position amounts to granting "special privileges" to foreign defendants sued in United States courts. This suggestion merely reflects respondent's unwillingness to recognize the very premise of the Convention: "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system." *Asahi Metal Industry Co.*, 107 S. Ct. at 1034.

Persons in foreign countries have widely varying degrees of familiarity with the English language. Even persons with good command of the language, however, necessarily suffer some disadvantage as against persons whose native tongue is English. Thus, foreign defendants face unique litigation problems when they are forced to defend themselves against untranslated allegations, made in the context of a fundamentally different legal system, from a distance of several thousand miles. That is particularly true in cases such as this, in which the plaintiff has challenged a major corporate decision with potentially vast repercussions. Respondent's claim against VWAG is that the 1978 Volkswagen Rabbit involved in the accident was defectively designed because it—like virtually every other car on the road at the time—was not equipped with air bags. VWAG's potential liability, if this claim were accepted, is enormous.

Far from treating foreign defendants more favorably, therefore, the Convention is designed simply to place for-

eign and domestic defendants in the same position: they both receive timely notice in a language they understand, and the time for making a response does not start to run until they are realistically in a position to begin to consider their defense. Moreover, respondent ignores the fact that the Convention equally benefits *American defendants* who are sued in the courts of other contracting nations and who face identical litigation burdens. See Pet. Br. 48.

Finally, respondent fails to appreciate the substantial benefits that the Convention confers on *American plaintiffs*. For reasons known only to himself, respondent chose to serve VWAG without utilizing the simple and inexpensive procedures of the Convention. But thousands of other American plaintiffs have taken advantage of the treaty, and as a result they have benefited from a mechanism that ensures that service will be effective and that any judgment obtained will be enforceable. Thus, respondent's view of the Convention, if accepted by this Court, would curtail not "special privileges" for foreign defendants but valuable protections for all litigants.

CONCLUSION

The judgment of the Appellate Court of Illinois, First District, should be reversed.

Respectfully submitted.

HERBERT RUBIN
MICHAEL HOENIG
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005

JAMES K. TOOHEY
Ross & Hardies
150 N. Michigan Avenue
Chicago, IL 60601

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

FEBRUARY 1988

APPENDICES

APPENDIX A

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to bring to the Department's attention a court decision which is likely to have serious adverse effects on international litigation in civil and commercial matters.

In in re Herwig J. Schlunk as Administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, vs Volkswagen AG, the Appellate Court of Illinois, applying Illinois law, held that plaintiff need not comply with the provisions of the Hague Convention on service abroad of judicial and extrajudicial documents in civil or commercial matters when serving a summons and complaint on the German Volkswagen AG, but that it was sufficient to serve those documents on Volkswagen America, Inc., a subsidiary of Volkswagen AG organized under the Laws of New Jersey, which was characterized in the decision as an involuntary agent of Volkswagen AG.

Volkswagen AG has filed a petition for a writ of certiorari challenging the Illinois Appellate Court's decision.

Other courts have recently come to similar conclusions and have put into question an established practice of service under the Convention confirmed by both federal and state courts throughout the years. Therefore, the Federal Republic of Germany attaches great importance to the Illinois Appellate Court's decision being reviewed by the Supreme Court of the United States.

The decision of the Appellate Court of Illinois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character.

Serving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague

Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time" and, if the receiving contracting State so requires, in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles. Such a practice rather produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude by the provisions of Article 15 and 16 of the Convention.

Furthermore, letting stand the Illinois Court's decision based upon a doubtful involuntary agent rationale, would mean that foreign defendants, whether corporations located in or private persons residing in a contracting State, could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Such a development would eviscerate the Hague Service Convention and throw its signatories back to the confusion existing prior to its ratificaiton.

It would be contrary to the intentions of the framers of the Convention who meant to put an end to that state of confusion by agreeing on mandatory unified procedures of notification and would lead to unproductive and costly litigation for both American plaintiffs and foreign defendants.

The Embassy would very much appreciate it if the Department were to convey the German position to the Supreme Court of the United States and to join in to defend an international convention which has proved to be beneficial to all of its signatory nations.

Washington, D.C., January 22, 1987.

Department of State
Washington, D.C.

APPENDIX B

NOTE NO. 54

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honor to draw its attention to the petition for Writ of Certiorari filed in the Supreme Court of the United States in the case of Volkswagenwerk Aktiengesellschaft v Herwig J Schlunk as Administrator of the Estates of Franz J Schlunk and Sylvia Schlunk.

This case involves an appeal against a judgment in the First District Appellate Court of Illinois in which the service of judicial documents upon a foreign defendant abroad has been ordered in accordance only with local state law. By labelling a domestic subsidiary of the German corporation concerned as an involuntary agent for service, the State Court avoided compliance with the provisions of the Hague Convention on the Service Abroad of judicial and extra-judicial documents in civil or commercial matters.

The Hague Service Convention was entered into by the contracting states so as to establish an agreed international method to simplify and expedite the transmission of judicial documents for service abroad. In ratifying its terms the signatory countries were desirous of creating a uniformly applicable system that would ensure effective service, under most circumstances, and afford the defendant abroad sufficient time to prepare a defence. The extensive coverage, the use of forms and the provisions for translation were designed to foster the uniform acceptability and efficacy of the Convention. The Appellate Court's decision is contrary to the essence of the Hague Service Convention.

Furthermore, the Supreme Court has held that international treaties be construed liberally. The Hague Service Convention applies to the service abroad of judicial documents. As, in this instance, where service necessarily involves the transmission of documents abroad, the Convention must be construed in the liberal spirit in

which it was intended, in order to mitigate the inconsistencies and hardships that the drafters sought to redress.

The interpretation of the Appellate Court allows the application of the Convention to be determined by local State law. The reasonable expectation of signatories that the provisions of the treaty will be adopted uniformly should not be frustrated by the inconsistencies in the service rules of the fifty different states of the Union. More specifically, manufacturers of signatory nations will be exposed to similar uncertainties where they have United States dealings that may be characterised only locally as "agents". State laws should yield when they are incompatible with or intrude upon the interpretation of a multi-lateral treaty entered into by the United States to ensure consistent international practice.

In addition, where a defendant's nation does not recognise the service methods as valid, a question as to the enforceability in that nation, of any judgment subsequently procured may legitimately be raised. Compliance with the comparatively straightforward provisions of the Convention can give rise to no such grounds.

Her Majesty's Government believes that it is important to uphold the uniform interpretation and application of this international treaty in the interests of the efficient conduct of international civil and commercial litigation.

Her Britannic Majesty's Embassy would be obliged if the Department of State could take the above views into account in formulating the position of the United States Government towards the present petition.

Her Britannic Majesty's Embassy avail themselves of the opportunity to renew to the Department of State the assurances of their highest consideration.

BRITISH EMBASSY

WASHINGTON DC
24 MARCH 1987

[SEAL]

APPENDIX C

AMBASSADOR DE FRANCE
AUX ETATS-UNIS

Washington, D.C.
le 7 avril 1987

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur d'attirer son attention sur la demande de saisine de la Cour Suprême ("Writ of Certiorari") présentée par la Société Volkswagen A.G. dans son litige avec Herwig J. SCHLUNK, Administrateur des biens de Frank J. SCHLUNK et Sylvia SCHLUNK. Cette demande de "Writ of Certoriari" fait suite à un judgment de la Cour d'Appel de l'Illinois, qui porte interprétation de la Convention de la Haye du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaries et extra-judiciaires en matière civile ou commerciale ("Hague Service Convention").

La France étant partie à cette Convention, les Autorités françaises considèrent que l'interprétation donnée par la Cour d'Appel de l'Illinois est contraire à la fois à la lettre et à l'esprit de ce traité international.

La Convention de la Haye du 15 novembre 1965 a pour objet de rendre plus efficace et plus simple la transmission à l'étranger d'actes judiciaries. A cet effet, elle établit des procédures précises dont l'une des conditions de fonctionnement est l'uniformité de leur application. Elle est en outre exclusive d'autres moyens de signification de ces actes.

En décidant que la loi locale de l'Etat de l'Illinois pourrait l'emporter sur les dispositions de la Convention, et, en l'espèce, permettait de procéder à la signification d'un acte judiciaire auprès de la filiale américaine d'une société étrangère, le jugement de la Cour de cet Etat aboutit en pratique à priver d'effet les procédures prévues par la Convention et à lui retirer le caractère d'uni-

formité pour les parties contractantes qu'ont voulu les auteurs de la Convention et qu'ont ratifié les Etats qui y sont parties.

Si la décision de la Cour de l'Illinois était suivie, chaque Etat aux Etats-Unis pourrait décider de suivre ses propres règles en la matière, et la situation juridique en résultant serait semblable à celle existant avant la Convention de la Haye, entrainant une confusion dans les procédures, des délais dans l'exécution et des frais dommageables aussi bien pour les sociétés américaines qu'étrangères. Outre les arguments de droit qui justifient l'exclusivité de la Convention, il est donc dans l'intérêt des Parties contractantes d'éviter qu'il soit porté atteinte au principe d'uniformité dans son application.

Pour ces raisons, les Autorités françaises souhaiteraient que leur position soit connue des Autorités américaines et prise en compte dans la définition de la position de l'Administration en réponse à la demande de la Cour Suprême pour l'octroi du "Writ of Certiorari."/.

L'Ambassade de France saisit l'occasion de la présente note pour renouveler au Département d'Etat les assurances de sa très haute considération.

The Department of State
Washington, D.C.

(Unofficial Translation)

AMBASSADOR OF FRANCE
IN THE UNITED STATES

Washington, D.C.
April 7, 1987

The Embassy of France presents its compliments to the Department of State and has the honor to direct its attention to the request for a grant of review by the Supreme Court of the U.S. ("Writ of Certiorari") which has been made by Volkswagenwerk AG in its litigation with Herwig J. SCHLUNK, administrator of Frank J. SCHLUNK and Sylvia SCHLUNK. This request for a "Writ of Certiorari" arises from a decision of the Appellate Court of Illinois interpreting the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").

France being a party to this Convention, the French Authorities consider its interpretation by the Appellate Court of Illinois to be contrary both to the letter and to the spirit of this international treaty.

It is the purpose of the Hague Convention of November 15, 1965 to make the transmission of judicial documents to a foreign country more efficient and simpler. To accomplish this it establishes precise procedures whose functioning depends on the uniformity of their application. Moreover, it excludes other means of service of such documents.

The Appellate Court of Illinois decided that the local law of the State of Illinois may override the provisions of the Convention and, in the instant case, it permits the service of a judicial document upon an American subsidiary of a foreign company. The decision of the Court of this State in practice amounts to rendering ineffective the procedures established by the Convention and deprives

the Convention of its uniform character for the contracting parties which was intended by the drafters of the Convention and which has been ratified by the signatories.

If the Illinois decision were followed, each State of the United States could decide to apply its own rules governing this matter, and the resulting legal situation would be similar to that existing prior to the Hague Convention, leading to procedural confusions, delays in execution, and costs to the detriment of American as well as foreign companies. Apart from the legal arguments which support the exclusivity of the Convention, it is therefore in the interest of the contracting parties to avoid impairment of the principle of the uniformity of its application.

For these reasons, the French Authorities hope their position is made known to the American Authorities and is taken into account in formulating the Administration's position in response to the Supreme Court's request in connection with the grant of a "Writ of Certiorari".

The Embassy of France avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

The Department of State
Washington, D.C.

APPENDIX D

EMBASSY OF JAPAN
WASHINGTON

April 7, 1987

E—52

The Embassy of Japan presents its compliments to the Department of State and has the honor to inform the latter, upon instruction from the home Government, the following:

1. The Government of Japan shares the common concerns expressed by the Note dated January 22, 1987 addressed to the Department of State by the Embassy of the Federal Republic of Germany in Washington, D.C. and to support the conclusion expressed in said note that the role played by the Hague Service Convention on both simplification for service and the protection for the person to be served should be duly evaluated and that the domestic procedures which will impair the intentions of the Convention are undesirable.

2. It, therefore, expresses its expectations that the views both of the Government of Japan and of the Federal Republic of Germany should be duly taken into consideration.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

APPENDIX E

Ambassade de France aux Etats-Unis
213 DE

Washington, le 7 Décembre 1987

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur d'attirer son attention sur la demande de révision par la Cour Suprême des Etats-Unis, présenté par la Société Volkswagen AG, de son litige avec Herwig J. SCHLUNK, administrateur de biens de Frank J. SCHLUNK et Sylvia SCHLUNK. Cette demande de révision par la Cour Suprême des Etats-Unis fait suite à la notification à l'etranger des actes judiciaires et extra-judiciaires en matière civile ou commerciale ("Hague Service Convention").

La France étant partie à cette Convention, les Autorités francaises considèrent que l'interprétation donnée par la Cour d'Appel de l'Illinois est contraire à la fois à la lettre et à l'esprit de ce traité international.

La Convention de la Haye du 15 Novembre 1965 a pour objet de rendre plus efficace et plus simple la transmission à l'étranger d'actes judiciaires. A cet effet, elle etáblit des procédures précises dont l'une des conditions de fonctionnement est l'uniformité de leur application. Elle est en outre exclusive d'autres moyens de signification de ces actes.

En décidant que la loi locale de l'Etat de l'Illinois pourrait l'emporter sur les dispositions de la Convention, et, en l'espèce, permettrait de procéder à la signification d'un acte judiciaire auprès de la filiale américaine d'une société étrangère, le Jugement de la Cour de cet Etat aboutit en pratique à priver d'effet les procédures prévues par la Convention et à lui retirer le caractère d'uniformité pour les parties contractantes qu'ont voulu les auteurs de la Convention et qu'ont ratifié les Etats qui y sont parties.

Si la décision de la Cour de l'Illinois était suivie, chaque Etat aux Etas-Unis pourrait décider de suivre ses propres règles en la matière, et la situation juridique en résultant serait semblable à celle existant avant la Convention de la Haye, entrainant une confusion dans les procédures, des délais dans l'exécution et des frais dommageables aussi bien pour les sociétés américaines qu'étrangères. Outre les arguments de droit qui justifient l'exclusivité de la Convention, il est donc dans l'intérêt des Parties contractantes d'éviter qu'il soit porté atteinte au principe d'uniformité dans son application.

Les autorités francaises qui sont très attachées au respect de la Convention de La Haye, souhaitent que leur position soit prise en considération par la Cour Suprême des Etats-Unis.

L'Ambassade de France, informe le Département d'Etat qu'une copie de cette note verbale est adressée à l'Ambassade de la République Fédérale d'Allemagne.

L'Ambassade de France saisit l'occasion de la présente note pour renouveler au Département d'Etat les assurances de sa très haute considération.

The Department of State
Washington, D.C.

(Unofficial Translation)

EMBASSY OF FRANCE
IN THE UNITED STATES

Washington, December 7, 1987

The Embassy of France presents its compliments to the Department of State and has the honor to direct its attention to the request for review by the Supreme Court of the U.S. which has been made by Volkswagenwerk AG in its litigation with Herwig J. SCHLUNK, administrator of Frank J. SCHLUNK and Sylvia SCHLUNK. This request for review by the U.S. Supreme Court arises from a decision of the Appellate Court of Illinois interpreting the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").

France being a party to this Convention, the French Authorities consider its interpretation by the Appellate Court of Illinois to be contrary both to the letter and to the spirit of this international treaty.

It is the purpose of the Hague Convention of November 15, 1965 to make the transmission of judicial documents to a foreign country more efficient and simpler. To accomplish this it establishes precise procedures whose functioning depends on the uniformity of their application. Moreover, it excludes other means of service of such documents.

The Appellate Court of Illinois decided that the local law of the State of Illinois may override the provisions of the Convention and, in the instant case, it permits the service of a judicial document upon an American subsidiary of a foreign company. The decision of the Court of this State in practice amounts to rendering ineffective the procedures established by the Convention and deprives the Convention of its uniform character for the contracting parties which was intended by the drafters

of the Convention and which has been ratified by the signatories.

If the Illinois decision were followed, each State of the United States could decide to apply its own rules governing this matter, and the resulting legal situation would be similar to that existing prior to the Hague Convention, leading to procedural confusions, delays in the execution, and costs to the detriment of American as well as foreign companies Apart from the legal arguments which support the exclusivity of the Convention, it is therefore in the interest of the contracting parties to avoid impairment of the principle of the uniformity of its application.

The French Authorities attach great importance to the Hague Convention being respected and wish that their position be taken into consideration by the U.S. Supreme Court.

The Embassy of France informs the Department of State that a copy of this note verbale is addressed to the Embassy of the Federal Republic of Germany.

The Embassy of France avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

The Department of State
Washington, D.C.

APPENDIX F

AMBASSADE DE BELGIQUE
06-94
No. 4053

L'Ambassade de Belgique présente ses compliments au Département d'Etat et a l'honneur d'attirer son attention sur l'affaire Schlunk-Société Volkswagen pendante devant la Cour Suprême des Etats-Unis.

Ce litige comporte une question portant interprétation de la Convention de La Haye du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile et commerciale.

En fonction des renseignements de l'espèce fournis au gouvernement belge par les autorités allemandes et s'il se vérifiait que l'acte introductif d'instance destiné à la défenderesse n'a été notifié qu'à sa filiate américaine non concernée puisque qualifiée dans l'instance d' "involuntary agent" le gouvernement belge estime qu'une telle pratique est contraire à une application conforme de la Convention précitée.

Pour ce motif le gouvernement belge apprécierait que sa position soit connue des autorités américaines et prise en compte dans la définition de l'attitude de d'administration américaine en réponse à la demande de la Cour Suprême pour l'octroi du "writ of certiorari" présenté par la société Volkswagen.

L'Ambassade de Belgique saisit l'occasion de la présente note pour renouveler au Département d' Etat les assurances de sa très haute considération.

Washington, D.C., le 8 décembre 1987.

Département d'Etat
Washington, D.C.

(Unofficial Translation)

EMBASSY OF BELGIUM
06-94
No. 4053

The Embassy of Belgium presents its compliments to the Department of State and has the honor to draw its attention to the case of Schlunk-Volkswagen AG pending before the Supreme Court of the United States.

This litigation concerns a question bearing on the interpretation of the Hague Convention dated 15 November 1965 relating to the service abroad of judicial and extrajudicial documents in civil and commercial matters.

Based on the information supplied to the Belgian Government in this case by the German authorities, and if it proves to be correct that the document commencing the action, destined for the defendant, was served only on its American subsidiary which was not concerned except inasmuch as it was an "involuntary agent" in this case, the Belgian government considers such a practice to be contrary to an application conforming to the above mentioned Convention.

For this reason the Belgian Government would appreciate it if its position were made known to the American authorities and were taken into account in formulating the position of the American administration in response to the request of the Supreme Court in connection with the grant of a "writ of certiorari" filed by Volkswagen AG.

The Belgian Embassy avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

Washington, D.C., December 8, 1987

Department of State
Washington, D.C.

AMICUS CURIAE

BRIEF

No. 86-1052

In the Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

HERWIG J. SCHLUNK, ADMINISTRATOR OF THE ESTATES OF FRANZ J. SCHLUNK AND SYLVIA SCHLUNK, DECEASED

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser

Department of State
Washington, D.C. 20520

DAVID EPSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

37 pp

QUESTION PRESENTED

Whether the Hague Service Convention prohibits a United States plaintiff from serving a summons and complaint upon a foreign-based corporation through domestic delivery of the documents to its wholly owned and closely controlled United States subsidiary.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Petitioner Volkswagenwerk Aktiengesellschaft (VWAG), a corporation organized under the laws of the Federal Republic of Germany, challenges a decision from the Appellate Court of Illinois holding that respondent properly served VWAG through in-state service on Volkswagen of America, Inc. (VWoA), VWAG's wholly owned United States subsidiary. VWAG contends that respondent was required to serve his complaint in accordance with the procedures specified in the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (Hague Service Convention).

The United States has a direct and substantial interest in this international dispute. The United States is a party to the Hague Service Convention and has a vital sovereign interest in assuring that the Convention is construed in accordance with its terms and the intent of the contracting nations, including the United States. The United States previously filed a brief in this case, at

this Court's invitation, urging that the Court grant the petition for a writ of certiorari. See U.S. Pet. Amicus Br. In addition, the United States has played a central role in the formulation and application of the Convention. The Department of State participated in its negotiation and domestic advice and consent process, and works through diplomatic channels to resolve difficulties that arise in its operation. See art. 14, 20 U.S.T. 364. The Department of Justice, through its Office of Foreign Litigation, serves as the United States Central Authority and is responsible for administration of the Convention in this country. See art. 2, 20 U.S.T. 362. Thus, the United States has both a strong interest and an important perspective on the question presented in this case. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987), slip op. 12 n.19.

STATEMENT

1. The Hague Service Convention is a multinational agreement, formulated through the Hague Conference on Private International Law, that prescribes methods for transmitting judicial and extrajudicial documents for service abroad.[1] The Convention, which is expressed in equally authoritative English and French versions (20 U.S.T. 361-373), seeks "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time" and, more generally, "to improve the organization of mutual judicial assistance" (20 U.S.T. 362 (preamble)). The Convention neither enlarges nor contracts

[1] See generally Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1983); 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)* 118-173 (1984 & Supp. 1986). The Hague Conference also formulated the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (Hague Evidence Convention). See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987).

the subject matter jurisdiction of a contracting nation's courts, nor does it alter the individual nation's standards for determining personal jurisdiction. The Convention is concerned solely with establishing internationally acceptable procedures for transnational service of process.[2]

Article 1 provides that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (20 U.S.T. 362). Articles 2 through 16 set forth procedures for service of judicial documents abroad (20 U.S.T. 362-365). Basically, each member nation must designate a "Central Authority" that shall "receive requests for service coming from other contracting States" (art. 2, 20 U.S.T. 362). The Central Authority, upon ascertaining that a request complies with the Convention's standard format and requirements (arts. 3-4, 20 U.S.T. 362), must arrange for service of the document through a method prescribed by the receiving nation's internal law or through a method designated by the requester and compatible with that law (art. 5, 20 U.S.T. 362-363). The Central Authority may require that the document be translated into the official language of the receiving nation (*ibid.*).

Upon completion of service, the Central Authority must provide a certificate to the requester indicating the method, place and date of service (art. 6, 20 U.S.T. 363). If the Central Authority is unable to serve the document, it must specify the circumstances that have prevented service (*ibid.*). The Convention generally recognizes the validity of other service methods so

[2] The United States (in 1967) and the Federal Republic of Germany (in 1979) have both ratified the Convention (see Pet. App. 27a, 45a). They are thus contracting nations and not mere "signatories" (VWAG Br. 10, 20, 30). The term "signatories" includes nations that have signed but not ratified the Convention and thus are not be bound by its terms. See arts. 26 and 28, 20 U.S.T. 366. Thirty other nations have either ratified or acceded to the Convention; Antigua and Barbuda; Barbados; Belgium; Botswana; Cyprus; Czechoslovakia; Denmark; Egypt; Fiji; Finland; France; Greece; Israel; Italy; Japan; Kiribati; Luxembourg; Malawi; the Netherlands; Nevis; Norway; Portugal; Seychelles; Spain; St. Kitts; St. Lucia; St. Vincent; Sweden; Turkey; and the United Kingdom.

long as the receiving nation does not object (arts. 8-11, 20 U.S.T. 363-364). It further provides that a receiving nation may refuse a request for service that complies with the terms of the Convention "only if it deems that compliance would infringe its sovereignty or security" (art. 13, 20 U.S.T. 364).

The Convention also includes provisions governing the entry of and relief from default judgments where "a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service * * * and the defendant has not appeared" (arts. 15-16, 20 U.S.T. 364-365). Other articles contain provisions governing service of "extrajudicial documents" (art. 17, 20 U.S.T. 365) and a number of "general clauses" (arts. 18-31, 20 U.S.T. 365-367).[3]

2. Respondent filed a wrongful death action in the Circuit Court of Cook County on behalf of his deceased parents, Franz and Sylvia Schlunk, against Dennis Reed and VWoA, arising from a 1983 automobile accident (Pet. App. 2a; R. 2-25). Respondent alleged that Reed's negligence precipitated a head-on collision in Cook County between Reed's automobile and the Schlunk's 1978 Volkswagen Rabbit (R. 2-9). He further alleged that VWoA had designed and sold a defective automobile that caused or contributed to his parents' deaths (R. 9-25).

Respondent served the summons and complaint on Reed directly and on VWoA through delivery to C.T. Corporation, VWoA's registered agent for receipt of process in Illinois (Pet. App. 2a).[4] Reed failed to appear and an order of default was

[3] In fiscal year 1987, the United States Central Authority received 5,433 incoming requests for service on American citizens, including 1,622 requests from the Federal Republic of Germany. In calendar year 1986, Germany received 661 American requests for service on German citizens. See F.R.G. Amicus Br. 7-8. We are unable to estimate the total number of American requests transmitted abroad because outgoing requests are not transmitted through the United States Central Authority.

[4] Illinois law permits service on individuals by delivery of a copy of the summons to the individual or to a family member at the individual's usual

entered against him (*ibid.*). VWoA filed a timely answer that, among other matters, denied designing or assembling the Schlunks' automobile (R. 28-31). Respondent then filed an amended complaint asserting his defective design claims against both VWAG and VWoA (R. 42-87).

Respondent attempted to serve VWAG through delivery of a summons and amended complaint to VWoA's registered agent, C.T. Corporation, which refused acceptance on the ground that it "is not the Statutory/Registered Agent in Illinois" for VWAG (R. 88). Respondent then attempted to serve VWAG by providing C.T. Corporation with an alias summons addressed to VWoA "as Agent for" VWAG (R. 93-94).[5] VWAG, at this juncture, entered a special appearance in the circuit court for the limited purpose of quashing service of process (R. 96-102). VWAG did not dispute that, upon proper service, it was subject to the personal jurisdiction of the Illinois courts. It maintained, however, that the court's jurisdiction could be perfected only through service in accordance with the Hague Service Convention (R. 158-169).

The circuit court denied VWAG's motion to quash service (Pet. App. 24a-26a). The court first determined that, under principles of Illinois common law, VWAG and VWoA "are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to have made such a formal appointment of VWoA as its agent" (*id.* at 25a). The court then concluded that "service of process upon VWoA as agent of VWAG is effective service of process upon VWAG under the Illinois Supreme Court Rules and Il-

place of abode. Ill. Ann. Stat. ch. 110, para. 2-203 (Smith-Hurd 1983). Illinois law further provides that a "private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; and (2) in any other manner now or hereafter permitted by law." Ill. Ann. Stat. ch. 110, para. 2-204 (Smith-Hurd Supp. 1987); see also *id.* ch. 32, para. 5.25.

[5] An alias summons is, of course, simply a summons issued when the "original has not produced its effect because defective in form or manner of service, and when issued, supersedes the first writ." *Black's Law Dictionary* 66 (5th ed. 1979). See Ill. Ann. Stat. ch. 110A, para. 103 (Smith-Hurd 1983).

linois Code of Civil Procedure" and does not conflict with the Hague Service Convention because that Convention "is applicable only to service of process outside of the United States" (*ibid.*). Upon VWAG's application, the circuit court authorized interlocutory appeal of its decision (*id.* at 25a-26a).

The Appellate Court of Illinois affirmed (Pet. App. 1a-20a). The court first rejected VWAG's contention that the Hague Service Convention provides the exclusive method for service on residents of other member nations. The court observed that the Convention, by its express terms, "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362). It concluded that the Convention was inapplicable here, stating (Pet. App. 4a):

> Under Illinois law, if the target for service can be found within the state there is simply no occasion for service abroad. Since there is no occasion for service abroad in this case, the Hague Convention, by its own terms, does not apply.

The court specifically rejected VWAG's contention that the Hague Service Convention is designed to achieve a uniform method of service, stating that "[i]t is unclear why foreign nationals should be allowed greater protection than United States citizens" from local service rules (*id.* at 7a-8a). The court expressed the view that VWAG had "conceded away this preemption argument" by acknowledging that foreign nationals can voluntarily appoint domestic agents for receipt of service in this country (*ibid.*).

The appellate court then examined "whether serving VWoA as agent for VWAG was good service" under Illinois law (Pet. App. 8a). The court concluded that VWAG was amenable to service under Illinois law because it was "doing business" in the state through its wholly owned subsidiary VWoA and that the relationship between VWAG and VWoA was sufficiently close to serve VWAG through delivery of the complaint to VWoA (*id.* at 8a-18a). It observed that "the relationship between

VWAG and VWoA is so close that it is certain that VWAG 'was fully apprised of the pendency of the suit' by delivery of the summons to VWoA" (*id.* at 17a-18a, quoting *Maunder* v. *DeHavilland Aircraft, Ltd.*, 102 Ill. 2d 342, 353, 466 N.E.2d 217, 223, cert. denied, 469 U.S. 1036 (1984)). The court rejected VWAG's various state law contentions as well as VWAG's claim that failure to quash service would prejudice its right to remove the action to federal court (Pet. App. 18a-20a). The Illinois Supreme Court denied VWAG's petition for leave to appeal (*id.* at 21a) but stayed the mandate pending VWAG's petition to this Court (*id.* at 22a-23a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Hague Service Convention represents a multinational effort to formulate acceptable methods for transnational service of judicial documents. The Convention responds to two basic international concerns. First, it recognizes that many civil law countries consider service a governmental function and accordingly object to attempts by foreign parties to serve documents within their territory. Second, it recognizes that the procedures for transnational service must be reasonably calculated to provide the defendant with timely notice of the pending proceedings. The Convention satisfies these concerns by creating a reasonably efficient and effective procedure, acceptable to all of the contracting nations, for serving documents within the territory of another contracting nation.

The question presented in this case is whether the Hague Convention prevents a United States plaintiff from serving a foreign corporation through domestic delivery of a summons and complaint on its wholly owned and closely controlled United States subsidiary. This question in turn entails two interrelated inquiries. First, is the Convention the exclusive method for serving a resident of a foreign nation—as petitioner VWAG maintains—or is the Convention's mandatory procedure limited to cases in which service of process takes place in the territory of another contracting nation? Second, if the Convention applies

only to cases in which service of process takes place in the territory of another contracting nation, then is service on a foreign corporation through in-state delivery of the documents to its wholly owned and closely controlled subsidiary properly regarded as a form of domestic service not governed by the terms of the Convention?

A. The United States has consistently maintained that the Hague Service Convention prescribes a generally mandatory regime with respect to cases in which a private party seeks to serve a civil summons and complaint within the territory of a foreign contracting nation. The Convention does not, however, govern every case in which the defendant is a foreign national. By its express terms, the Convention applies "where there is occasion to transmit a judicial or extrajudicial document *for service abroad*" (art. 1, 20 U.S.T. 362 (emphasis added)); it does not prohibit a private plaintiff from employing domestic service procedures when the foreign defendant is properly amenable to service where the action is pending.

This construction is wholly consistent with the language, structure, and history of the Convention, which draw a clear distinction between service abroad and service within a contracting state's own territory. The distinction, in turn, preserves the Convention's central goal of ensuring that foreign litigants receive expeditious and effective notice of "documents to be served abroad" (20 U.S.T. 362 (preamble)). Foreign nations retain their right to object to unauthorized process-serving within their borders (arts. 8, 10, 20 U.S.T. 363), while individual defendants retain certain procedural protections where "a writ of summons or equivalent document had to be transmitted abroad for the purpose of service" (art. 15, 20 U.S.T. 364).

The Hague Service Convention does not limit the authority of a contracting nation to determine when there is occasion to transmit a document for service abroad. In particular, it does not limit the power a contracting nation to permit service of foreign corporations doing business within its borders through delivery of a summons and complaint to domestic agents or subsidiaries of those corporations. Indeed, it was well established

at the time the Convention was drafted that a foreign corporation doing business in the United States was properly amenable to service of process by delivery of a summons and complaint to an agent or wholly owned American subsidiary. The United States understood that its ratification of the Convention would make no major changes in this aspect of its internal law. The result is not unfair to foreign corporations, nor does it impose undue hardship. The primary guarantor of fairness in this context is the Due Process Clause, which requires that a foreign corporation receive timely and effective notice of any legal action commenced against it in the United States. This is as much, or more, protection than United States corporations receive when they do business overseas.

B. Although the domestic law of each contracting nation determines *when* extraterritorial service is required, the question *whether* the plaintiff has in fact attempted to make "service abroad" must in each case be resolved as a matter of construction of the Hague Service Convention. The negotiating history reveals quite clearly that "service" was understood by the drafters of the Convention to refer to the formal delivery of a document legally sufficient to charge the defendant with notice of a lawsuit. "Service abroad" was accordingly understood to refer to the formal delivery of such a document in the territory of another contracting nation. Thus, when the law of the forum provides that service is legally complete upon the delivery of a summons and complaint to a wholly owned domestic subsidiary of a foreign corporation, this should not be regarded as service abroad. Although the subsidiary will in all likelihood communicate with the foreign parent corporation about the contents of the summons and complaint, the form and manner of these communications are left to the discretion of the corporate entities, and are not part of the formal requirements for service of process.

The Hague Service Convention's procedures have proven to be a reasonably efficient and reliable method for service of process in most cases. The United States strongly encourages

American plaintiffs to employ those procedures even in situations – as here – where there are alternative methods for serving process. But the Convention was neither intended to be, nor is, the sole method for United States litigants to serve foreign corporations doing business in the United States. The policies favoring use of the Convention do not justify imposing it, as a mandatory and exclusive regime, in every situation.

ARGUMENT

THE HAGUE SERVICE CONVENTION PERMITS SERVICE OF A SUMMONS AND COMPLAINT UPON A FOREIGN-BASED CORPORATION THROUGH DOMESTIC DELIVERY OF THE DOCUMENTS TO THE CORPORATION'S WHOLLY OWNED AND CLOSELY CONTROLLED UNITED STATES SUBSIDIARY

A. The Hague Service Convention Addresses the Service of Judicial Documents Within The Territory Of Another Contracting Nation

1. The Hague Service Convention was formulated in response to the rapid growth of foreign commerce, and consequent increase in transnational litigation, following World War II. The European countries maintained widely divergent internal service practices, resulting in great confusion and delay when attempts were made to serve a civil summons and complaint within foreign borders.[6] Previous multi-national conventions had failed to resolve fully these difficulties. The United States, which in prior years had been reluctant to participate in

[6] The various European practices were detailed by the Columbia University School of Law Project on International Procedure. See *International Co-Operation in Litigation: Europe* (H. Smit ed. 1965). See also, *e.g.*, Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1040-1043 (1961); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory*, 1959 Proc. ABA Sec. of Int'l & Comp. L. 34; Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 534-537 (1953); Harvard Research in International Law, *Draft Convention on Judicial Assistance*, 33 Am. J. Int'l L. 11, 43-65 (Special Supp. 1939).

conventions governing judicial procedure, took a lead role in developing solutions, both through unilateral revisions of its own procedures and through participation in the Tenth Hague Conference on Private International Law.[7]

The Hague negotiating delegations confronted two basic points of contention. First, some civil law countries, including Germany, treat the formal service of judicial documents as an official act of government; they accordingly consider any attempt by a foreign litigant to serve documents within their borders as an encroachment upon their sovereignty.[8] Second, the internal law of some civil law countries, including France, permitted a method for transnational service of process known as *notification au parquet* that provided little assurance that

[7] See 1 B. Ristau, *International Judicial Assistance (Civil and Commercial)* Pt. 1 (1984 & Supp. 1986). The United States traditionally declined to participate because it viewed questions of judicial procedure as primarily matters of state law. See *ibid.*; Jones, *supra*, 61 Yale L.J. at 556-558; Comment, *The United States and the Hague Conferences on Private International Law*, 1 Am. J. Comp. L. 268 (1952). However, by the 1960's, Congress recognized that the United States could play an important leadership role in questions of international judicial procedure. In 1963, Congress authorized United States participation in the Hague Conference (Joint Res. of Dec. 30, 1963, 77 Stat. 775), and the United States Judicial Conference revised Rule 4 of the Federal Rules of Civil Procedure to address questions of transnational service. See Fed. R. Civ. P. 4(i). In 1964, Congress enacted legislation giving foreign litigants broad unilateral assistance in serving foreign process within the United States. See 28 U.S.C. 1696. See generally Comment, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony*, 62 Mich. L. Rev. 1375 (1964).

[8] See, *e.g.*, Smit, *supra*, 61 Colum. L. Rev. at 1040; Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 Minn. L. Rev. 1069, 1075-1086 (1965); Longley, *supra*, 1959 Proc. ABA Sec. of Int'l & Comp. L. at 35. The Columbia Project noted that while Germany objected to any service by foreign persons within its borders (*International Co-Operation in Litigation: Europe, supra*, at 192-193), at the same time it sought to extend its own service into foreign countries through non-compulsory methods ("*formlose Zustellung*") and also allowed for service through publication (*id.* at 173-179). See also Heidenberg, *Service of Process and Gathering of Information Relative to a Law Suit Brought in West Germany*, 9 Int'l Law. 725, 728-729 (1975).

the foreign defendant would receive timely notification of the pending law suit.[9] The delegations attempted to accommodate these differences in their internal law through the formulation of unobjectionable and effective standardized procedures permitting private parties to serve documents within the territory of a foreign contracting state. See, *e.g.*, III Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 127-129 (1964) (comments of the U.S. delegation).

The resulting Convention is, by its terms, primarily an enabling treaty, designed to create an internationally acceptable procedure for serving documents abroad.[10] The United States has maintained that the Hague Service Convention prescribes a generally mandatory regime for private parties to serve a civil summons and complaint within the territory of a foreign contracting nation. See U.S. Pet. Amicus Br. 16.[11] Under this

[9] See *International Co-Operation in Litigation: Europe, supra*, at 44-46 (Belgium), 122-129 (France); 383-385 (Netherlands). As the United States ratification documents explain, *au parquet* service generally consisted of delivering the document to a local court official, who was then supposed to transmit the document abroad through diplomatic or other channels. See S. Exec. Rep. 6, 90th Cong., 1st Sess. 11-12, 14-16 (1967); S. Treaty Doc. C, 90th Cong., 1st Sess. 5-6, 21 (1967). Under this practice, service was effective immediately, even if the defendant failed to receive actual notice of the action. See S. Exec. Rep. 6, *supra*, at 11-12. See generally Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 Int'l Law. 650 (1967) (describing France's post-Convention revisions to *notification au parquet*).

[10] The Convention's preamble states that the intention of the signatories was "to *create* appropriate means" for timely serving documents abroad and "to *improve* the organisation of mutual judicial assistance for that purpose" (20 U.S.T. 362 (emphasis added)). See also S. Exec. Rep. 6, *supra*, at 14 ("the convention is an *enabling* convention, designed to create benefits where none now exist") (statement of Philip Amram, member of the U.S. delegation; emphasis in original).

[11] See also Brief for the United States as Amicus Curiae at 9 in *Anschuetz & Co., GmbH* v. *Mississippi River Bridge Auth.*, No. 85-98; Brief for the United States as Amicus Curiae at 7 in *Club Mediterranee, S.A.* v. *Dorin*, No. 83-461; Brief for the United States as Amicus Curiae at 5 in *Volkswagenwerk A.G.* v. *Falzon*, No. 82-1888 ("United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the

regime, a private plaintiff cannot invoke his local forum's service rules to serve a foreign defendant within a foreign nation's borders—through, for example, personal delivery or use of postal channels (see, *e.g.*, Fed. R. Civ. P. 4(i))—unless the foreign nation consents.[12] The United States further maintains, however, that the Convention's procedures govern methods for *transnational* service of process: the Convention's language, structure, history, and professed purpose all indicate that the Convention does not prohibit a contracting nation from specifying how process originating from its own courts may be served within its own borders. See U.S. Pet. Amicus Br. 16-18.

Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures."). The question whether the federal government must use the Convention to serve judicial documents in the territory of other contracting nations remains open: a number of civil law nations have suggested that at least some federal civil enforcement actions are not "civil or commercial" matters, and thus do not come within the terms of the Convention. See Restatement of Foreign Relations Law of the United States § 471 comment (f) (Tent. Final Draft July 15, 1985). No question is presented in this case about the definition of a "civil or commercial" action; whatever the phrase means, it clearly encompasses respondent's products liability action.

[12] The Convention does not contain a provision expressly forbidding such service. The prohibition is, however, reasonably implicit in the Convention's various articles. For example, Article 1 states, in mandatory terms, that the Convention "shall apply • • • where there is occasion to transmit a judicial • • • document for service abroad" (20 U.S.T. 362). See *Societe Nationale Industrielle Aerospatiale*, No. 85-1695 (June 15, 1987), slip op. 11 n.1 (noting the Convention's "mandatory" character). Subsequent provisions then permit contracting nations to lodge formal objections to service through consular channels (art. 8), through postal channels (art. 10(a)) and through official channels of the receiving state (art. 10(b) and (c)). 20 U.S.T. 363. And other provisions recognize that the contracting states may provide more liberal methods for service within their own borders through subsequent treaties (art. 11) or by unilateral internal legislation (art. 19). 20 U.S.T. 363-365. These provisions, read in combination, indicate that the Convention was formulated as a generally mandatory regime for transnational service in contracting nations that refuse to allow alternative service methods. See also U.S. Pet. Amicus Br. 16-17 n.27 (noting several situations where the Convention procedures may not be mandatory).

The Hague Service Convention's formal title indicates that the agreement is concerned with "Service Abroad" (20 U.S.T. 361). Its operative language expressly recognizes a difference between service within and without the territory of the forum state. Article 1 provides that the Convention shall apply "where there is occasion to transmit a judicial or extrajudicial document *for service abroad*" (20 U.S.T. 362 (emphasis added)).[13] The Convention draws on traditional principles of territorial sovereignty to adopt a fundamental distinction between formal service within and service without the borders of the forum state.[14] The ratification documents reaffirm the distinction.[15]

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[13] The equally authoritative French version of this provision, when read literally, expresses this distinction in even stronger terms: it states that the Convention is applicable in all cases where a judicial document is to be transmitted abroad to be served there. See 20 U.S.T. 362 ("La présente Convention est applicable • • • dans tous les cas où un acte judiciaire • • • doit être transmis à l'étranger pour y être signifié ou notifié.").

[14] See Hague Conference on Private International Law, *supra*, at 28-29 (1983); Restatement of Foreign Relations Law of the United States, ch. 7 introductory note and § 471(1) (Tent. Final Draft July 15, 1985). This distinction is present throughout the Convention's provisions. For example, Article 8 provides that each contracting state "shall be free to effect service of judicial documents upon persons abroad" through consular agents, but adds that a state "may declare that it is opposed to such service *within its territory*" (20 U.S.T. 363 (emphasis added)). Articles 15 and 16 provide certain procedural protections from default judgments where a summons "had to be *transmitted abroad for the purpose of service*" (20 U.S.T. 364-365 (emphasis added)). Article 19 later declares that the Convention does not affect provisions of a contracting state's internal law that permit alternative methods of transmitting "documents coming from abroad, for service *within its territory*" (20 U.S.T. 365 (emphasis added)).

[15] See, *e.g.*, S. Exec. Rep. 6, *supra*, at 1 ("This convention applies to the service abroad of judicial and extrajudicial documents in all civil and commercial cases."); S. Treaty Doc. C, *supra*, at 4 (The Convention provisions "provide machinery by which agencies in country A may assist tribunals and litigants of country B, in actions pending in country B, to secure service of documents in country A.") (Secretary of State Rusk); see also Comm. on Int'l Law, *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 22 Rec. Ass'n Bar of N.Y.C. 280, 287 (1967) ("Domestic legislation – whether federal or state – cannot secure for United States residents the cooperation of foreign sovereigns in facilitating service on foreign soil of process emanating from the United States federal and state courts.").

This distinction between foreign and domestic service preserves the Convention's basic protections of foreign interests. Foreign nations retain their right to object to unauthorized process-serving within their borders (arts. 8, 10, 20 U.S.T. 363), while individual defendants retain certain procedural protections from default judgments where "a writ of summons or equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention" (arts. 15, 16, 20 U.S.T. 364-365). The domestic forum, in turn, is free to exercise *its* recognized sovereign prerogatives (see, *e.g.*, arts. 8, 10(c), 19, 20 U.S.T. 363-365) to determine appropriate rules for service within its borders. Cf. *Societe Nationale Industrielle Aerospatiale*, slip op. 21 n.29.[16]

The distinction between foreign and domestic service is also consistent with the basic purposes of the Convention. The Convention was designed to address the special problems that arise when one sovereign conducts official acts within the borders of another and to help ensure that foreign defendants served abroad receive timely notice of pending legal actions; it was not intended to immunize foreign nationals from domestic service rules. The Convention's preamble makes clear that the Convention was formulated to create appropriate means to ensure timely notice of documents "to be served abroad" (20 U.S.T. 362). The Convention goes on to establish generally uniform procedures "for that purpose" (*ibid.*).[17] Thus, the Convention

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[16] Articles 15 and 16 are certainly important, but they are not as all-encompassing as VWAG suggests (VWAG Br. 30-33). Their express terms indicate that they do not apply when the service requirements of the forum state can be fulfilled without transmitting the document overseas (for example, by personal delivery of the summons to a defendant present within the territory of the forum state), or when the transmittal is made under circumstances not governed by the Convention (for example, when the the recipient's address is unknown (art. 1, 20 U.S.T. 362) or when service is made pursuant to a bilateral agreement (art. 11, 20 U.S.T. 363-364)). See III *Actes et Documents de la Dixième Session*, *supra*, at 378 ("L'article 16 limite la faculté de relever la forclusion aux cas où la signification ou la notification de l'acte introductif d'instance • • • doit être faite selon les dispositions de la convention.").

[17] The negotiating delegations specifically considered and rejected a proposal that would have extended the Convention's protections under Article 15

creates an internationally acceptable standardized method for serving documents on foreign soil, and places limits on other potentially objectionable transnational service methods, including formal service through personal delivery in a foreign nation, or through diplomatic or postal channels. But it was not intended to standardize the contracting nations' domestic service procedures – however desirable that result may be.[18]

2. The Hague Service Convention does not dictate when "there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362); the Convention's language and negotiating history both indicate that this is a

(then numbered Article 13) whenever a summons "concerne une personne qui réside [ou qui a son siège principal] dans le territoire d'un Etat contractant autre que celui du for" (III *Actes et Documents de la Dixième Session, supra*, at 252 (concerns a person who resides (or has his principal place of business) in the territory of a contracting state other than that of the forum)). See *id.* at 252-255. The Belgian delegate stated that under the Belgian Judicial Code, a judicial document may always be served on a foreigner who is in Belgium even if he does not reside there, and that, in his view, this principle should be perpetuated under the Convention. *Id.* at 254 ("M. Jenard (Belgique) • • • signale que selon le Code judiciaire un acte judiciaire peut toujours être signifié à un étranger qui se trouve en Belgique même s'il n'y réside pas. Il estime quant à lui que ce principe devrait être consacré par la convention."). See also *ibid.* (statements of the Rapporteur; M. Bellet (France); and M. Loeff (Netherlands)).

[18] Our interpretation is fully consistent with established principles of treaty interpretation. "In interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations,' *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), to which '[g]eneral rules of construction apply.' *Id.*, at 262. See *Ware* v. *Hylton*, 3 Dall. 199, 240-241 (1796) (opinion of Chase, J.). We therefore begin 'with the text of the treaty and the context in which the written words are used.' *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). The treaty's history, ' "the negotiations, and the practical construction adopted by the parties" ' may also be relevant. *Id.*, at 396 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943))." *Societe Nationale Industrielle Aerospatiale*, slip op. 10-11. Furthermore, " '[t]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight' " (*id.* at 12 n.19 (citations omitted)).

question for the nation where the action is pending.[19] If, under the internal law of a contracting nation, service must take place abroad, then the Convention procedures govern. But if the law of the forum nation does not require service abroad, and the plaintiff does not attempt extraterritorial service, then the law of the forum determines whether service was proper.

This position reflects the United States' understanding and intent at the time it ratified the Hague Service Convention. Prior to the formulation of the Convention, it was well established that a foreign corporation doing business in the United States was amenable to service through delivery of documents to a subsidiary or agent conducting the corporation's business in the United States. See, *e.g.*, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 444-445 (1952).[20] As Judge Learned Hand explained, the corporation is attributed location outside its state of incorporation "by virtue of local activities of its agents which realize its purposes." *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184, 185 (2d Cir. 1949).[21]

[19] The negotiating delegations recognized that Article 1's provision that the Convention shall apply where "there is occasion" to transmit documents for service abroad (20 U.S.T. 362) would inevitably require reference to the forum nation's law. See III *Actes et Documents de la Dixième Session, supra*, at 167-169. The Rapporteur explained in the debates that one must leave to the requesting state the task of defining when a document must be served abroad, that this solution was a consequence of the inability to establish an objective test, that it is a drawback and decreases the obligatory force of the Convention, but that it does provide clarity. *Id.* at 254 ("Il pense que l'on doit laisser à l'Etat requérant le soin de définir quand l'acte doit être notifié à l'étranger, tout en reconnaissant que cette solution a eu pour conséquence qu'il n'a pas été possible d'établir une condition objective, ce qui constitue un inconvénient et amoindrit la force obligatoire de la convention; cette solution a néanmoins permis d'obtenir la clarté.").

[20] "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative." 342 U.S. at 444-445.

[21] See also, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315-320 (1945); *Bomze* v. *Nardis Sportswear, Inc.*, 165 F.2d 33, 37 (2d Cir.

American courts regularly applied this concept to allow service on a foreign corporation through in-state delivery of documents to its United States agent or subsidiary conducting its affairs in the forum state.[22] American courts have uniformly viewed such service methods – in which all the formalities of service are completed within the forum state's territory – as forms of in-state service.[23]

The United States neither expected nor intended that ratification of the Hague Service Convention would make major changes in that understanding and the resulting domestic service practices. In submitting the Convention to the Senate for advice and consent to ratification, the President, the Secretary of State, and the United States negotiating delegation reported that the Convention would make no major changes in existing American law, while requiring many civil law countries to adjust their practices "in the direction of our generous system of international judicial assistance and our concept of due process in the

1948) (L. Hand, J.); *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.).

[22] See, *e.g.*, *Perkins*, 342 U.S. at 439-440; *United States* v. *Scophony Corp.*, 333 U.S. 795, 818 (1948); *id.* at 820 (Frankfurter, J., concurring); *Latimer*, 175 F.2d at 186; *In re Electric & Musical Indus., Ltd.*, 155 F. Supp. 892 (S.D.N.Y. 1957) (subpoena duces tecum); *In re Seimens & Halske A.G.*, 155 F. Supp. 897 (S.D.N.Y. 1957) (subpoena duces tecum); *United States* v. *Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955); *United States* v. *Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 511 (S.D.N.Y. 1951).

[23] See *International Shoe Co.*, 326 U.S. at 320 ("We are likewise unable to conclude that the service of process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice."); *Société Foncière et Agricole des Etats Unis* v. *Milliken*, 135 U.S. 304, 307 (1890) ("it matters not under what law the company is organized, or where its domicil is, service of process may be made upon the local agent representing it within the county in which the suit is brought"). See also, *e.g.*, Pet. App. 5a-6a; *Lamb* v. *Volkswagenwerk A.G.*, 104 F.R.D. 95, 97 (S.D. Fla. 1985); *Zisman* v. *Sieger*, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985); *McHugh* v. *International Components Corp.*, 118 Misc. 489, 491-492, 461 N.Y.S.2d 166, 167-168 (Sup. Ct. 1983). See also text and footnotes, at pages 23-25, *infra*.

service of documents."[24] This view was repeated in the subsequent hearings before the Senate Committee on Foreign Relations.[25] The Senate Committee reiterated this point in recommending advice and consent; likewise, the various national and state bar associations that supported ratification gave no suggestion that the Convention would limit traditional in-state service methods.[26]

[24] S. Treaty Doc. C, *supra*, at 1 (President Johnson); see also *id.* at 8 ("The most significant aspect of the convention is the fact that it requires so little change in the present procedures in the United States, yet at the same time requires such major changes, in the direction of modern and efficient procedures, in the present practices of many other [nations]." (statement of Secretary of State Rusk)); *id.* at 20 ("In its broadest aspects the convention makes no basic changes in U.S. practices, while it makes substantial changes in the practices of many of the civil law countries, moving their practices in the direction of the U.S. approach to international judicial assistance and our concepts of due process in the service of process." (report of the U.S. delegation)).

[25] See, *e.g.*, S. Exec. Rep. 6, *supra* at 9 ("it is my opinion, therefore, that this convention does not invade the domain of State law in the United States.") (prepared statement of Joe C. Barrett, member of the U.S. delegation and member of the National Conference of Commissioners on Uniform State Laws); *id.* at 11 ("[The Convention] leaves our common-law due-process principles unaffected and unchanged.") (prepared statement of Philip Amram, member of the U.S. delegation); *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Executive C, 90-1): Hearing Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 12-13 (1967) ("The second most remarkable thing about the Convention is that it requires absolutely no change in our procedures because the judicial assistance which is required by the Convention is less than the assistance that we are already giving under our own Act [28 U.S.C. 1696]."") (testimony of Philip Amram); *id.* at 13-14 ("I think this is the reason that there has been no opposition from anyone. No lawyer examining this Convention could find in it anything but benefit to himself as a practitioner, and benefit to his clients.") (testimony of Philip Amram); *id.* at 16 ("The explanation is as you have given it on your part is that [the Convention] requires no change.") (statement of Sen. Fulbright).

[26] See S. Exec. Rep. 6, *supra*, at 2 ("In other words, nothing now authorized by our law will be repealed or modified in the event of ratification of this convention by the United States."); Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650 (1965); Comm. on Int'l Law, *The Hague Convention on the Service Abroad of Judicial and Ex-*

Thus, the Hague Service Convention's history conclusively shows that the United States negotiated and ratified the Convention with the understanding that the agreement established a mechanism for serving documents on foreign soil while making no major changes in pre-existing federal and state rules governing service in this country. Accordingly, the United States cannot accept VWAG's proposition that the Hague Service Convention broadly limits the authority of the United States – or the individual states – to allow service of a foreign corporation, doing business in the United States through a wholly owned subsidiary, by traditional domestic service methods.

3. VWAG argues that limiting the Hague Service Convention to extraterritorial service will result in unfairness or oppression of foreign corporations, and suggests that the lower court's construction will permit foreign corporations to be sued under fictitious agency theories that deprive them of effective notice and an opportunity to defend against pending litigation (VWAG Br. 47). These arguments overlook the fundamental role that the Due Process Clause performs in ensuring that all litigants in United States courts – whether native or foreign – receive a fair trial.[27]

Due process requires that state and federal courts abide by " ' "traditional notions of fair play and substantial justice" ' " (*Asahi Metal Industry Co.* v. *Superior Court*, No. 85-693 (Feb. 24, 1987), slip op. 1 (citations omitted)). This means, in the present context, that those courts must adopt methods of service that are "reasonably calculated, under all circumstances, to ap-

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trajudicial Documents in Civil or Commercial Matters, 22 Rec. Ass'n Bar of N.Y.C. 280 (1967).

[27] Significantly, in ratifying the Convention the United States expressed the view that the Convention in effect *extended* the protections of due process – which already applied to domestic service of process – to extraterritorial service of process, which had previously operated by less exacting standards. See, *e.g.*, S. Exec. Rep. 6, *supra*, at 15 ("The United States already provides the fullest due-process protection to foreign defendants in U.S. litigation. From the point of view of the U.S. delegation, we greet with pleasure the offer of any other state to mold its procedures in the direction of our concepts of due process.") (statement of Philip Amram). See text and footnotes at 18-19, *supra*, and note 37, *infra*.

prise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). These protections make it unnecessary to adopt the sweeping interpretation of the Hague Service Convention urged by VWAG in order to protect foreign corporations against unfair methods of domestic service.

VWAG cannot seriously contend that the Illinois service rules violate due process principles. A state does not offend due process by subjecting a foreign corporation that conducts business in the state through a wholly owned and closely controlled subsidiary to the jurisdiction of that state's courts. See *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315-320 (1945).[28] A state is accordingly entitled to prescribe a service procedure to assert its jurisdiction over such a corporation. See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987) slip op. 5-6; *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 444-445 (1946). That procedure must, of course, satisfy *Mullane's* demand for notice "reasonably calculated" to inform the defendant of the pendency of the action (339 U.S. at 314). But it "is enough that [the defendant] has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual." *International Shoe Co.*, 326 U.S. at 320. The service method employed here clearly satisifies that test.

The Illinois Appellate Court determined that VWAG transacts business in Illinois through its wholly owned subsidiary,

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[28] VWAG concedes that it is subject to the personal jurisdiction of the Illinois courts based on its extensive contacts with the forum state (Pet. App. 8a). We note that a similarly situated American company in Germany likewise would be subject to the personal jurisdiction of the German courts. German law provides that a German court may exercise personal jurisdiction over a non-German based on the mere presence of property in Germany. "Under this rule, 'a Russian may leave his galoshes in a hotel in Berlin and may be sued in Berlin for a debt of 100,000 Marks because of assets within the jurisdiction.' " Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 14-15 (1987) (paraphrasing Breit, *Ueber das Ausluender-forum*, 40 Juristische Wochenschrift 636, 639 (1911)).

VWoA. See Pet. App. 8a-17a. It further determined that "the relationship between VWAG and VWoA is so close that it is certain that VWAG 'was fully apprised of the pendency of the action' by delivery of the summons to VWoA" (*id.* at 17a). VWAG cannot credibly maintain that service upon its wholly owned subsidiary would fail to give it sufficient notice of the lawsuit. VWAG has *complete* control over its subsidiary: VWAG can take the necessary steps to assure that it receives prompt notice of the initiation of a suit.[29] Domestic out-of-state corporations routinely adopt operating procedures to assure that a subsidiary communicates notice of a summons to the corporate headquarters, and there is no reason why VWAG cannot do the same. Foreign corporations may find the need to develop such internal procedures inconvenient, but they are certainly not onerous or unfair.[30] Indeed, other contracting nations employ similar service practices.[31]

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[29] See, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984). ("A parent and its wholly owned subsidiary have a complete unity of interest. * * * They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." (footnote omitted)).

[30] This result is fully consistent with *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), which recognized that foreign corporations are allowed to incorporate United States subsidiaries in order that they might conduct business in this country on a comparable basis with domestic firms (*id.* at 188). See Treaty of Friendship, Commerce and Navigation, United States-West Germany, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593. VWAG points to no persuasive reason why foreign corporations that do extensive business in the United States through a wholly owned subsidiary cannot comply with the procedures that govern other out-of-state corporations. We note that if VWAG's position were to prevail, a foreign corporation could presumably demand, for example, that every "judicial document" in a lawsuit be served through the Convention, notwithstanding the common domestic rules providing that post-summons documents to be served upon a represented party shall be served upon his attorney. See, *e.g.*, Fed. R. Civ. P. 5(b).

[31] For example, the European Court of Justice recognized in its landmark "dyestuffs" decision that "the separation between parent firm and subsidiaries arising out of the fact that each has a distinct legal personality does not prevent their conduct on the market from being viewed as a unity for purposes of the application of rules of competition." *Imperial Chem. Indus., Ltd.* v. *Commission of the European Communities*, 2 Common Mkt. Rep. (CCH) ¶ 8161, at 8031 (July 14, 1972). See Hadari, *The Structure of the Private Multinational Enterprise*, 71 Mich. L. Rev. 729, 790 (1973). In that case, the Commission of the European Communities had served its decision on a parent corporation through service upon its subsidiary, reasoning that "it is sufficient if the notification is duly received within the recipient's 'sphere of influence' " (*Imperial Chem. Indus., Ltd.*, at 8013). The European Court of Justice found no reason to question that procedure because the parent received actual notice (*id.* at 8026). Thus, while some contracting nations may object to serving a foreign corporation through a domestic subsidiary, the practice is, in fact, utilized in other countries. See also, *e.g.*, *Acciaierie Laminatoi Magliano Alpi (ALMA) SpA* v. *High Auth. of the European Coal & Steel Community*, Case 8/56 (Ct. J. Eur. Coal & Steel Community Dec. 10, 1957), at 97, 99 ("application may be made of a principle of law recognized in all countries of the Community, namely that a written declaration of intent becomes effective as soon as it arrives in due course within the control of the addressee"); *International Co-Operation in Litigation: Europe, supra*, at 123 (noting that "service in France can be made at a branch establishment.").

B. The Service Method Employed Here Does Not Constitute "Service Abroad" Within The Meaning Of The Hague Service Convention

1. Although the Hague Service Convention allows each member nation to determine when extraterritorial service is required, this does not mean that each nation may determine for itself what constitutes extraterritorial service. The Convention imposes mandatory procedures that must be followed in all civil and commercial litigation where there is "service abroad." The meaning of "service abroad" must therefore be determined as a matter of treaty construction rather than local law. Thus, even if an Illinois plaintiff is not *required* by the Hague Service Convention to make extraterritorial service on VWAG, the question remains whether the method of service chosen is in fact a form of "service abroad." If it is, then it is the Convention procedures—and not whatever procedures are prescribed by state law—that must govern service of process.

The Convention does not by its terms define the meaning of the critical phrase "service abroad." Nevertheless, it is clear from the negotiating history that service of process was under-

stood to refer to the formal delivery of documents that is legally sufficient, under the law of the forum, to charge the defendant with notice of a pending action.[32] There was no suggestion that service of process was understood to be synonymous with the transmittal of any information to the defendant, no matter how informal, about the pendency of a lawsuit. The Convention's negotiating history unequivocally affirms this understanding.[33]

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[32] "The English term 'service' presents no ambiguity to American or English lawyers; it means the formal delivery of a legal document to the addressee in such a manner as legally to charge him with notice of receiving it." 1 B. Ristau, *supra* at 123; *Black's Law Dictionary* 1227 (5th ed. 1979). See, *e.g.*, *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987), slip op. 6-7; 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1063, at 225 (2d ed. 1987). European nations also understand the term "service" to signify an official act and not merely "a generic description governing the transmission of pleadings to foreign defendants who are sued in the courts of other signatory nations" (VWAG Br. 20). See, *e.g.*, Heidenberg, *supra*, 9 Int'l Law. at 725 ("Service of process is defined in German law as the 'formal delivery of a document in accordance with statutory provisions.' " (citing RG 124, 22; BGH 8, 316)). Indeed, it is the official nature of service that gives rise to sovereignty concerns. See note 8, *supra*. Illinois law specifies that service shall be accomplished by delivery of process to "any officer or agent of the corporation found anywhere in the State" (Ill. Ann. Stat. ch. 110, para. 2-204 (Smith-Hurd 1983 & Supp. 1986)). Service was thus complete under Illinois law upon delivery of process to VWAG's agent within Illinois.

[33] For example, the *Rapport explicatif* stresses that Article 1 employs the French juridical terms for service, *signification* and *notification*, to emphasize that the Convention applies only in cases where one transmits a document in a formal manner. III *Actes et Documents de la Dixième Session*, *supra*, at 366 ("On a encore voulu affirmer, par l'emploi de deux mots juridiques, que la convention s'applique seulement aux cas où l'on transmet un acte de manière formelle."). During the debates, the German delegate specifically affirmed this point. See *id.* at 159 ("La convention ne peut s'appliquer que dans le cas où l'on signifie ou transmet un acte de *manière formelle*, et non d'une transmission informelle." (Mr. Arnold (Germany) (emphasis in original)). The *Rapport* further states that the use of more general terms, such as delivery or transmission, to determine the scope of the Convention was rejected because the Convention contemplates two operations: the transmission of the document from the requesting state to the receiving state, and service upon the person to whom it is intended. *Id.* at 366 ("La solution d'employer une expression neutre comme *remise* ou *transmission* pour fixer le domaine de la convention a été repoussée. Il a été convenu en effet que la convention visait deux opérations: la transmission de l'acte de l'Etat requérant à l'Etat requis, et sa *signification* ou sa *notification* à la personne à qui l'acte est destiné.") (emphasis in original).

Given that service refers to the formal delivery of documents, then service abroad clearly refers to the formal delivery of documents in the territory of another member nation. That being the case, service on a wholly owned and closely controlled domestic subsidiary does not entail service abroad. Under Illinois law, service of process on a parent corporation is complete when the summons and complaint are served on a wholly owned subsidiary doing business within the State. It may be plausible to assume, as VWAG asserts, that there will generally be some further communication between the subsidiary and the parent corporation about the content of the summons and complaint. But this further transmittal of information, assuming it occurs,[34] is not part of the formal legal action that constitutes service of process. Thus, when respondent served VWoA with a summons naming VWAG as a defendant in respondent's suit, there was no "service abroad" within the meaning of the Convention.

The suggested interpretation is also fully consistent with the Convention's rejection of the European practice of *notification au parquet*. The Convention's drafters clearly understood

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[34] VWAG repeatedly asserts (*e.g.*, Br. 14, 21, 22, 27, 29, 30) that the subsidiary must transmit the original summons and complaint to the parent corporation overseas. But this is not the only possible course that a foreign corporation might instruct its domestic subsidiary to follow. The foreign corporation might instruct the subsidiary to prepare a translation of the summons and complaint, or a summary of the summons and complaint, and transmit the translation or summary overseas. Or, the foreign corporation might send a representative to the forum nation to inspect the summons and complaint and make arrangements for handling the litigation on the scene. Finally, the foreign corporation might issue standing instructions to the subsidiary directing it to make arrangements on behalf of the foreign corporation for handling the litigation. None of these three alternatives would involve transmission of the original summons and complaint abroad. Indeed, the second and third alternatives would not involve the transmission abroad of *any* written information about the summons and complaint.

notification au parquet to be a form of service abroad.[35] The drafters indicated in the debates that the countries that used this service method had specified in their formal service rules that the documents had to be transmitted to the foreign defendant through diplomatic or postal channels.[36] Thus, VWAG is quite wrong in suggesting that the decision below "revives in a single stroke one of the principal evils that the Convention sought to eliminate – *notification au parquet*" (VWAG Br. 32). Service of process on a wholly owned and closely controlled domestic subsidiary does not entail service abroad; *notification au parquet* does.

For the same reason, the practice which has evolved in this country of serving an out-of-state defendant through the state secretary of state or other state officials should generally be regarded as service abroad. These state service practices are analogous to *notification au parquet*.[37] Typically, secretary of

[35] The *Rapport explicatif*'s discussion of Article 1 notes that, while the strict language of the provision might raise a question whether or not the Convention regulates *notification au parquet*, the understanding of the drafting commission, based on the debates, is that the Convention would apply. See III *Actes et Documents de la Dixième Session, supra*, at 367 ("Cependant, en face de la lettre stricte de la disposition, on peut toujours se poser la question de savoir si, quand un Etat admet que la signification ou la notification d'une personne se trouvant à l'étranger soit faite au parquet, la convention s'applique ou ne s'applique pas. L'interprétation authentique de la Commission telle qu' elle ressort des débats, est dans le sens de l'application de la convention." (emphasis and footnote omitted)).

[36] See III *Actes et Documents de la Dixième Session, supra*, at 160, 167-169, 254 (statements of Mr. Bellet and Mr. Loussouarn (France) and M. Loeff (Netherlands)). See also, *e.g.*, Fr. C. Pr. Civ. arts. 684-686. The Convention plainly treats formal service through diplomatic or postal channels as service "abroad" (see arts. 8, 10(a), 20 U.S.T. 363); it naturally follows that *au parquet* procedures are likewise a form of service "abroad."

[37] Notably, the United States delegation objected to *notification au parquet* because the practice lacked adequate assurances that notice would be communicated to the defendant and would therefore fail to "meet the requirements of 'due process of law' under the Federal Constitution." III *Actes et Documents de la Dixième Session, supra*, at 128 (citing *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928)). See S. Exec. Rep. 6, *supra*, at 11-12, 14-16; S. Treaty Doc. C, *supra*, at 21. Philip Amram, a member of the United States negotiating

state service requires that a summons and complaint be served on the secretary of state or other governmental official, who then is obliged as a matter of law to transmit the summons and complaint to the defendant through postal channels. See U.S. Pet. Amicus Br. 10 n.16. As in the case of *notification au parquet*, the transmission of the summons and complaint is an integral part of the legal requirements for effective service. See generally 2 J. Moore & J. Lucas, *Moore's Federal Practice* §§ 4.15, 4.22, 4.41-1 (2d ed. 1987). Thus, we believe that the Convention limits the unconsented use of this method of service. Contracting nations that have exercised their rjghts under Articles 8 and 10 and have objected to service through diplomatic or postal channels (such as Germany) have effectively insulated their citizens from this service method. See 20 U.S.T. 363. Persons in contracting nations that authorize use of those channels receive the procedural protections set forth in Articles 15 and 16. Foreign parties that expressly consent to such service are, of course, bound by the terms of their consent. See U.S. Pet. Amicus Br. 10.

VWAG argues (Br. 37) that if service on a wholly owned subsidary of a foreign corporation is not service abroad, then a whole host of fictitious agency theories can be employed to circumvent the Convention. But this argument – at bottom, a resort to a parade of horribles – is more fanciful than real. On the one hand, as noted above (see pages 20-22, *supra*), an agency theory that is not "reasonably calculated" to inform the defendant of the action and allow it an opportunity to defend would violate due process. *Mullane* v. *Central Hanover Trust, supra*. On the other hand, if in order to overcome due process objections the theory incorporates a legal requirement that the defendant be directly notified in order to complete service (see, *e.g. Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928)), then the theory

delegation, explained that "*notification au parquet* has no relation to our 'long arm' statutes" because American courts "have marked out the constitutional due-process boundary lines of these statutes." S. Exec. Rep. 6, *supra*, at 12. Mr. Amram nevertheless apparently believed that the Convention would regulate long arm statutes providing for service through the secretary of state in the same manner as in the case of the foreign practice of *notification au parquet*. See *id.* at 15.

would entail service abroad and would be subject to the Convention. Contrary to VWAG's suggestion, therefore, the set of state substitute service practices that would both avoid due process infirmities and yet not entail service abroad is in reality quite small.[38]

2. As a general matter, the United States strongly encourages American plaintiffs to avail themselves of the Hague Service Convention's internationally accepted procedures even in situations – as here – where there are alternative methods for serving process. The Convention procedures have proven to be a reliable and generally preferred method for service of process in most cases.[39] But the policies that favor use of the Convention do not justify imposing it, as a mandatory and exclusive regime, in every situation. The Convention was neither intended to be, nor is, the sole method for United States litigants to serve foreign corporations doing business in the United States. Furthermore, the present Convention is not likely to be the final word in resolving international conflicts over service of

[38] *Karl Schermer & Co.* v. *Alpha International*, petition for cert. pending, No. 87-150 (filed July 24, 1987), on which VWAG relies (Br. 37), illustrates this point. In that case, service was allowed upon a foreign corporation through delivery of the documents to the corporation's domestic insurance adjuster. Although this type of substitute service does not entail service abroad, the case is quite aberrational. Indeed, the service method employed there appears defective under basic due process principles. If in order to cure the due process problems the state required parallel notification directly to the foreign corporation, then this method of service would constitute service abroad and would trigger the procedural requirements of the Convention.

[39] See, *e.g.*, *Gould Entertainment Corp.* v. *Bodo*, 107 F.R.D. 308, 309 (S.D.N.Y. 1985); *Oman Int'l Finance Ltd.* v. *Hoiyong Gems Corp.*, 616 F. Supp. 351, 356-357 (D.R.I. 1985). Failure to employ the Convention's procedures may raise serious obstacles to obtaining foreign assistance in enforcing a United States judgment. See Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 L. & Pol. Int'l Bus. 325, 340-341 (1987). Thus, American plaintiffs have a strong incentive to use the Convention in lieu of other available service methods.

process.[40] The interests of the international community are best served by applying the Convention in accordance with the Convention's terms. Diplomatic efforts can then proceed on a firm footing to resolve the remaining differences.

We accordingly submit that the Hague Service Convention does not preclude respondent from serving VWAG through in-state delivery of the complaint, in accordance with Illinois law, to VWAG's wholly owned and closely controlled United States subsidiary. The Appellate Court of Illinois did not err in refusing to quash service in this case.

CONCLUSION

The decision of the Appellate Court of Illinois should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State

DAVID EPSTEIN
Attorney

FEBRUARY 1988

[40] As we have noted (note 11, *supra*), there is a lack of unanimity on the question whether the Hague Service Convention must be employed when a government agency seeks to serve a judicial summons and complaint abroad. Difficulties have also developed in obtaining foreign cooperation when serving complaints seeking punitive damages. See U.S. Pet. Amicus Br. 20 n.32. The contracting nations may ultimately wish to resolve these and other questions through further consultation and cooperation.

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AMICUS CURIAE

BRIEF

No. 86-1052

In The
Supreme Court of the United States
October Term, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK AND SYLVIA SCHLUNK,

Respondents.

On Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AMICUS CURIAE IN SUPPORT OF RESPONDENTS

EUGENE I. PAVALON
Two North LaSalle Street
Suite 1200
Chicago, Illinois 60602
(312) 263-1500
President, Association of Trial Lawyers of America

LEONARD M. RING
Counsel of Record
LEONARD M. RING & ASSOCIATES
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765
Counsel for Amicus Curiae

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED

Whether foreign-based corporations who conduct substantial business in the United States through or with a wholly-owned subsidiary subject to the jurisdiction of American courts must be served with process through the Hague Service Convention; or is service upon the foreign-based corporation's agent sufficient?

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INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae* in support of respondents in this case. Copies of letters from both parties granting their consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary association of approximately 65,000 trial lawyers from every state in the U.S. and several foreign countries. ATLA members primarily represent injured victims of tortious misconduct. ATLA is concerned the strict interpretation of the Hague Service Convention[1] urged by petitioner and supporting amici in this case would result in delay and prejudice to U.S. victims of foreign defective products in the prosecution of claims.

We are all potential victims of products manufactured by foreign nationals who have a very substantial presence in the United States; they ought not to be allowed to avoid service of process based upon the use of fictitious legal separateness.

ATLA views the Illinois decision as not in conflict with the Convention but in accord with its intent and established principles of law.

STATEMENT OF THE CASE

VWAG[2] is a corporation organized under the laws of the Federal Republic of Germany having its place of business in that nation. VWoA[3] is a wholly-owned subsidiary of VWAG organized under the law of New Jersey. It has its principal place of business in Troy, Michigan and is registered to do business in Illinois. (C 172, 333) VWoA manufactures vehicles in the United States and also imports motor vehicles manufactured by VWAG for sale through its dealers. The total vehicle sales of VWoA world-wide in 1983 were over 230,000; 100,000 of those were manufactured in the United States. (C 334-35); thus more than 130,000 were manufactured and shipped from

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[1] Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 U.S.T. 361, T.I.A.S No. 6638.

[2] Petitioner Volkswagenwerk Aktiengesellschaft.

[3] Volkswagen of America, Inc.

Germany.[4] Eight of the thirteen directors of the Board of Management of VWAG served as directors of VWoA and are residents of West Germany. (C 376-388) Five of the seven board meetings of VWoA for the years 1983 and 1984 were held in West Germany. (C 468)

Under the 1983 "Importer Agreement" between the parent and subsidiary, VWoA is obliged to protect the value of VWAG's trade name and trademark; VWoA is required to follow the standards VWAG sets for "maintaining stock and stock levels"; and VWoA is obliged to promote the image of VWAG. VWAG retained control over all of VWoA's activities and assigned marketing territories. (C 230-261)

Although the agreement is terminable by either party, VWoA is not able to recover any damage in the event of termination by VWAG. (C 249) A prior 1973 agreement contained essentially the same provisions. (C 422-461)

Article 1 of the Hague Service Convention provides:

> "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[5]

The Appellate Court in this case applying Illinois law concluded that service could be had on VWoA, the subsidiary of defendant VWAG in Illinois, because VWAG is doing business in the state of Illinois and VWoA, a subsidiary, is but VWAG's agent under Illinois and general principles of U.S. law.[6] The Illinois court thus construed the treaty

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[4] Until 1984, an undetermined number were manufactured by Audi Aktiengesellschaft, another subsidiary of VWAG (C173).

[5] 20 U.S.T. 361. Also, the preamble pertains to "documents to be served abroad." *Id.* 361.

[6] "Involuntary agent" is a term not a part of the Illinois Court's opinion. Rather, it found VWoA to be VWAG's agent "by operation of law." *Schlunk*, 503 N.E.2d at 1054.

inapplicable stating: "Since there is no occasion for service abroad in this case, the Hague Convention, by its terms, does not apply." *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill.App.3d 594, 503 N.E.2d 1045, 1047.

VWAG, on the other hand, asserts that VWoA was an "involuntary agent" and service of process of VWAG must be had according to the procedures set out in the Convention. As the Illinois court so aptly observed in response: "Even if the intended recipient is standing right next to him, a process server, according to VWAG, would have to send a summons off to West Germany." *Schlunk*, 503 N.E.2d at 1047.

SUMMARY OF ARGUMENT

The explicit language employed by the framers of the Hague Service Convention and the expressed purpose for the treaty are preserved intact and not invaded by the Illinois court decision. The whole tenor and scheme of the treaty is to prevent injustice resulting from improper, ineffectual means of summoning aliens to answer legal process in countries where they have allegedly committed actionable acts but are not present in the forum state at the time civil suit is filed.

The Illinois decision does not contravene the treaty provisions. It does nothing more than find service of process valid based upon firmly engrained principles of agency and jurisdictional law. Moreover, when it is considered in light of the realities of modern day communications, the very substantial presence of foreign manufacturers in the United States and the serious impact their acts have upon the safety and welfare of American citizens at home, the Illinois decision reflects eminent justice, practicality and wisdom.

Finally, it is clear that the treaty does not always operate as smoothly as petitioner contends. For example, Illinois Supreme Court Rules mandate that a summons may not be served after 30 days from its date. Actual practice has demonstrated that to accomplish service in compliance with the treaty within 30 days is a virtual impossibility. Also, where service is refused by a foreign government, the matter must be resolved through "diplomatic channels." This is a breeding ground for delay.

ARGUMENT

I.

CONSIDERATION OF WHAT THE CONVENTION IS AND WHAT IT IS NOT COMPELS THE CONCLUSION THAT IT IS INAPPLICABLE TO THE CASE AT BAR.

A. The Scheme and Tenor of the Terms of the Treaty Show Its Inapplicability.

To attribute any reasonable meaning to the treaty it must be construed to require service through the central agency as provided in the treaty only where a defendant is a non-resident alien and is not doing business through an agent in the forum country at the time service is attempted to be made. Thus, where a non-resident alien commits a tort while physically present in this country and service of process cannot personally be had on such non-resident alien because at the time of suit he is residing in his native land, service of process through the medium of the Hague Convention makes sense. In that type of case, the non-resident alien would have no connection with the country where sued and would require and depend on notification through the central agency to guarantee adequate notice of the nature of the suit so he can provide a defense.

However, this is not the factual setting in the case at bar. *Schlunk* is a case of a multi-national corporation doing substantial business in a foreign country, i.e., the United States, through a wholly-owned subsidiary; and, based on the number of vehicles sold by VWAG to its American subsidiary, enjoyed a sales volume in hundreds of millions of dollars. VWAG conducts its very substantial business in the United States in the English language and, through VWoA, performs all the acts of a local corporation.

VWAG also earns substantial profits from its business in the U.S. also from its dealings with its subsidiary. Pertinent here is the Illinois Supreme Court holding in *Maunder v. DeHavilland Aircraft of Canada*, 102 Ill.2d 342, 466 N.E.2d 217, 223:[7]

> We believe that a corporation that has established a supply depot in Illinois to support an enterprise that has sold 885 airplanes in the United States and logged millions of passenger miles should be subject to the jurisdiction of Illinois courts.

See also *Connelly v. Uniroyal, Inc.*, 75 Ill.2d 393, 389 N.E.2d 155 (1979).[8]

To put the issue in perspective, the Hague Service Convention has meaning if interpreted to apply in cases where the foreign national has no presence at the time of suit in the country where sued. Conversely, the treaty would become a mockery where an alien is actively engaged in business in a country where it is subject to suit and where it has exercised the privilege to sue, yet when sued, must be served only through a designated central agency under the guise that the summons delivered to its own operating subsidiary would not provide it with adequate and reasonably prompt notice.

As has been noted, VWAG does not contest the jurisdiction of Illinois courts over it, only the method of service. 495 N.E.2d at 1117. How can a company that daily conducts business in the United States in the English language, advertises its product here in the English language,

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[7] In *Maunder v. DeHavilland Aircraft of Canada*, 102 Ill.2d 342, 466 N.E.2d 217 (1984), cert. den., 105 S.Ct. 511 (1984), where a Canadian government owned corporation doing business through a subsidiary in Illinois was held subject to in personam jurisdiction of Illinois courts. Service of summons on the wholly owned subsidiary was upheld.

[8] Belgian Corporation held amenable to suit in Illinois under long arm statute.

employs and communicates with lawyers and accountants in English, seriously argue that in order for it to have adequate notice it must be served through the Convention, and in its own native tongue, in order for it to understand the nature of the claim?

VWAG's position becomes particularly less persuasive in this day and age of electronic communications such as telex and fax machines that can instantaneously transmit copies or the content of entire documents abroad. Casting rhetoric aside, how would service on a wholly-owned subsidiary right after filing of a complaint not result in more timely notice and thus be more beneficial to the foreign principal than would notice by means of the Convention?[9]

Petitioner's argument in this case is further diluted when we consider that eight of the thirteen VWAG directors, all German nationals, presumably speak the English language or they would not have been chosen to sit on the board of the wholly-owned subsidiary in the United States. Obviously the Hague Service Convention was not intended for such a result as is urged here. And to suggest that VWoA has a semblance of independence because it, like its parent, is free to terminate the distributorship agreement is asking us to embrace incredible naivete. Imagine VWoA being allowed by the eight German directors to terminate the Importer Agreement with its parent – except if directed by VWAG. Merely stating the proposition demonstrates its absurdity.

That the Convention was not intended to apply to nonresident aliens, such as VWAG, doing business through a subsidiary in the nation where suit is brought, finds

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[9] See also argument, *infra* p. 15, of delays in service that can be precipitated by acts of receiving nations in refusing to serve summonses.

support in Articles 15, 16 and 19, in addition to other Articles.[10]

While petitioner and its amici advance Articles 15 and 16 to support their case (Pet. Br. p. 30), the fact is that Article 15 by its plain language reads in part, "Where a writ of summons or an equivalent document *had* to be transmitted abroad for the purpose of service, under the provisions of the present Convention, . . ." (Emphasis supplied.) This article clearly allows an interpretation that not all judicial documents were contemplated to be transmitted abroad for the purpose of effectuating valid service. Under Article 15 only where a summons "had" to be transmitted abroad for purpose of service does the convention apply. Obviously, where a foreign national is continuously engaged in commercial transactions in a foreign country, has a physical presence in that foreign country through a subsidiary whose sole business is to promote and carry on the principal business activity of the parent, there is no reason to treat it differently than domestic citizens for purposes of service of a summons.

Likewise, Article 16 reads, in part: "When a writ of summons or an equivalent document *had* to be transmitted abroad for the purpose of service, under the provisions of the present Convention,. . ." (Emphasis supplied.) Here again the word "had" must be given some meaning. Its inclusion in the treaty strongly butresses the construction that not all summonses are required to be "transmitted abroad" for service.

Even more persuasive is the fact that if the framers of the Convention intended that without exception *all* judicial documents and summonses *had* to be transmitted abroad

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[10] Arguments concerning construction of the Preamble, Article 1 and other parts of the treaty are made in the Illinois Court opinion, respondent's brief and the brief of the United States as amicus and need not be repeated here.

to effectuate valid service it would have been very simple to just say so. The fact is, the treaty does not state that it applied to *all* cases where the defendant was a nonresident alien, but only, as Article 15 says: "Where a writ of summons or an equivalent document *had* to be transmitted abroad for the purpose of service, under the present Convention,. . ." (Emphasis supplied.)[11]

Article 19[12] presents yet another example of the Convention's nonexclusivity when it states the Convention shall not affect internal law of a contracting state which permits other methods of transmission ". . . of documents *coming from abroad*, for service within its territory." (Emphasis supplied.) This Article certainly demonstrates an expression of intent for flexibility.

Finally, the arguments that the Convention by its terms applies only where there is *necessity* to transmit documents abroad as made by the respondent and the Illinois court decision are sound. We join in them. We also endorse the interpretation given the Convention by the United States in its brief. We further add that in a review of the entire subject of service of documents abroad commencing with the 1905 Convention on Civil Procedure to the Hague Service Convention in 1965, it is stated:[13]

> The scope of application of the Convention has not changed from that of the Hague Conventions

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[11] 20 U.S.T. at 364.

[12] Article 19 provides:

> To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles *of documents coming from abroad for service within its territory*, the present Convention shall not affect such provisions. (Emphasis ours.)

[13] Soek, *The Service of Documents Abroad and the Protection of Defendants Resident Abroad*, 29 Netherlands International L.R. 72 (1982)

> on Civil Procedure. Like these conventions the Convention on the Service of Documents applies only to civil and commercial cases. Moreover, *the Convention applies only* if the address is known of the person for whom the document is intended, and *if the document that is to be served has to be sent* to a country that is a party to the Convention. (Emphasis supplied.)

Obviously, no document "has to be sent" to West Germany in this case. The presence of an agent in the United States more than suffices to satisfy service requirements.

B. The Object of the Convention is to Abolish Notification Au Parquet–Not to Abolish Expeditious, Reliable Service of Process.

The Illinois decision is not *notification au parquet* as petitioner and its amici argue. (Pet. Br. p. 16, 32, 43-46) Under *notification au parquet*, a non-domiciliary with a known address abroad is served usually through a state official. It anticipates that diplomatic channels will then be utilized for delivery of the papers to the defendant abroad–but failure to do this does not invalidate the service. We agree that the treaty was intended to eliminate *notification au parquet* and all its pernicious fall-out.

But the Illinois court decision is not the equivalent of *notification au parquet* - and there is no suggestion to resurrect it. The decision does not legitimize "service" on a foreign national by means of a delivery to a local officer such as an Attorney General or a Secretary of State.[14] In sum, it does not countenance delivery of process to a local court official for transmittal through diplomatic channels to a defendant residing abroad. It was that type of service

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[14] VWAG's contention that "The Secretary of State is no different from a subsidiary in practical, operational terms" (Pet. Br. p. 45), displays how misguided it is by attempting to equate a state officer with its wholly-owned subsidiary, VWoA.

that the treaty was intended to change. See *United States v. Pink*, 315 U.S. 203, 232 (1942); Amram, *Report of the Tenth Session of the Hague Conference on Private International Law*, 59 Am.J.of Int'l Law 87, 90 (1965). But service on an agent of a wholly-owned subsidiary of a foreign corporation which, as here, is engaged annually in multi-million (if not multi-billion) dollars in business with its agent in the English language, and where the agent daily conducts such business in this country in the English language with American banks, American advertisers, American accountants and American lawyers is hardly *notification au parquet*.

C. Treaty Construction Principles Mandate the Result Reached by the Illinois Court.

It is submitted the treaty by its very terms does not call for resort to anything but its text and the context in which the written terms are used in order to reach the result advanced by respondent and decided by the Illinois court. *Air France v. Saks*, 470 U.S. 392, 397 (1985). But, if required, reference to the history, negotiations and the meaning attributed to the treaty should be made. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943); *Shumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 (1985). Moreover, general rules of construction apply. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 107 S. Ct. 2542 (1987). In construing documents there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion. . . ." *The Five Per Cent. Discount Cases*, 243 U.S. 97 (1917). Based on these precepts, the conclusion that the Convention is applicable only when documents need to be sent abroad for service is inescapable.

With respect to the treaty at bar, extensive reference to history and negotiations is found in *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3 Cir. 1981),

cert.den., 454 U.S. 1085 (1981), where the court referred to the senate report concerning the Convention.[15] As summarized in the brief filed by the United States in this case, p. 18, the domain of state law was not intended to be invaded by the treaty; no basic changes were being made in U.S. practices while substantial changes were being made in the practices of many civil law countries; that is, the treaty was aimed at practices in civil law countries that authorized methods of service that failed to give notice to American citizens, "thereby creating the risk that an American defendant would suffer a default judgment in that country without having had an opportunity to defend the claim." *DeJames*, 654 F.2d at 288.

Of course, the reverse situation is also true – i.e., a foreign defendant should not run a similar risk of default judgment in an American court. In the case at bar, given the relationship between VWAG and VWoA, such a situation could not realistically occur. Nor did it.[16]

The Hague Service Convention has meaning when applied to situations where a non-resident alien living abroad when sued in a foreign nation must be served *abroad* to get notice of the suit. In such circumstance service through the central agency is required to ensure the defendant will be given notice of the claim in apt time to take action against it. However, it makes no sense for any country that is signatory to the treaty to construe it to require service of summons through the Convention where a defendant is engaged in business in the foreign country

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[15] *Report of the Senate Committee on Foreign Relations on the Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S.Exec.Rep. No. 6, 90th Congress, 1st Sess. April 12, 1967.

[16] VWAG was immediately notified by its subsidiary served November 19, 1984, and filed a timely limited appearance on December 18, 1984 to contest the service. See *Schlunk*, 495 N.E.2d at 1115.

where the suit is brought. This is no more beneficial to the citizens of foreign countries doing business in the United States than it is for citizens of the United States doing business in foreign countries.

In this case, for example, had VWAG been the *only* defendant and service was required to be made upon it through a central agency, it could be weeks or months after suit before VWAG would learn of the action. This would be so even though service upon its subsidiary in the United States would ordinarily be made a day or two after the action is filed and an exact copy of the summons and complaint could be faxed, or the content telexed or otherwise speedly transmitted to Germany in a matter of hours after service. Obviously, delay in receiving notice of the lawsuit by means of the proffered interpretation by VWAG of the treaty as opposed to service on a responsible and responsive agent of the foreign corporation as construed by the Illinois court, can in no way benefit any signatory to the treaty.[17]

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[17] In language strikingly appropriate to this point, this Court in construing the Hague Evidence Convention in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 107 S.Ct. 2542 (1987), stated:

> Nevertheless, we cannot accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant. Assuming, without deciding, that we have the lawmaking power to do so, we are convinced that such a general rule would be unwise. In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts. See Fed. Rule Civ. Proc. 1.

Illinois also has the same interest in the determination of litigation in its courts. Ill.Rev.Stat. 1985, ch. 110, ¶1-106.

In view of the control exercised over VWoA by the parent, petitioner's argument that the Illinois court was not justified in assuming that its wholly-owned subsidiary, VWoA "would transmit the service document to VWAG in the Federal Republic of Germany" (Pet. Br. p. 21) is, to say the least, strained. So is its argument that VWAG is,"a West German corporation 'in another country.'" (Pet. Br. p. 20)

Contrary to principles of treaty construction, it is VWAG who is advancing a strict rather than liberal interpretation of the Convention.[18] To adopt the strict interpretation of the convention put forth by VWAG would only tend to insulate foreign defendants from having to respond to actions brought against them in countries abroad in which they are dealing in the equivalent of a "domestic" corporation. In this case, for example, VWAG, although it would obviously have had almost immediate knowledge of the suit through the service on its agent, could nonetheless sit back and avoid participation in the case and avoid being made subject to discovery orders or other judicial proceedings for some time. This could not have been the object of the treaty.

Petitioner's further argument that "under German legal interpretation, German sovereignty is violated in cases where foreign judicial documents are served directly by mail within the Federal Republic of Germany" is misapplied. (Pet. Br. p. 30) Service upon a subsidiary of a German corporation doing business in the United States where, as in this case, that subsidiary is wholly controlled and dominated by the German parent corporation is obviously not the same as serving "foreign judicial documents . . . directly by mail within the Federal Republic

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[18] Where the United States is a party to a treaty, it is to be construed more liberally than a private agreement. *Air France v. Saks*, 470 U.S. 392, 396 (1985).

of Germany." It is served in person in the United States directly upon the German corporation through its recognized agent established by operation of law.

Equally strained is petitioner's argument that service upon an agent would routinely confront foreign multi-national companies with judicial documents pouring in through various sources in an unpredictable fashion, written in languages other than their own and arriving days or weeks after their time to respond will have started to run. This may have had surface appeal at the turn of the century or even forty years ago, but not in the late 1960's when the treaty was born. Obviously, when viewed in the context and under the facts of the case at bar, the argument fails.[19]

II.

IN ILLINOIS THERE ARE IMPEDIMENTS TO THE "SMOOTH" OPERATION OF THE CONVENTION.

The state law involved and actual practice under it indicates that compliance with the Convention, under the facts in this case, would result in longer required time for notice to be received by a defendant.

Illinois Supreme Court Rule 102(b) provides:

> (b) **When Service Must Be Made.** No summons in the form provided in paragraph (d) of Rule 101 may be served later than 30 days after its date. A summons in the form provided in paragraph (b) of Rule 101 may not be served later than three days before the day for appearance. Ill.Rev.Stat. 1985,

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[19] Petitioner and its amici waive before this Court the supremacy clause of the Constitution, Art. VI, Section 2. There is no denying that the supremacy clause is controlling where applicable. But, this is not a case of a conflict between a treaty of the United States and a contrary law of a State. It involves simply the proper construction of the treaty. This is perhaps why Petitioner and its amici did not support its argument with authority.

ch. 110A, Rule 102(b)

The form of summons prescribed by Illinois Supreme Court Rule 101(d) designates the following language be included on the face of the summons:

> "This summons may not be served later than 30 days after its date." Ill.Rev.Stat. 1985, ch. 110A, Rule 101(d)

Thus it is at once clear that all of the procedure for service by the Convention must be accomplished within 30 days. The Illinois rule does not allow for extension of the expiration date of the summons.

In actual practice, service by the Convention in Illinois becomes a virtual impossibility. The Consulate General of Japan, in a similar action filed in Illinois by counsel for this amicus, has written the Sheriff of Cook County, Illinois, on October 16, 1987 that:[20]

> The Ministry of Foreign Affairs received the documents from you on September 29, 1987. If your request is accepted by the ministry, it will take at least two months before the result being notified [sic] to the ministry (from a district court). Because of taking a time [sic] in the process of legal procedure, the date for service on the summons, within 30 days after September 25 the summons were made out [sic], may expire. Therefore, the necessary requirement to be re-submitted to the Ministry of Foreign Affairs is to put off its expiration date.

The entire text of the Consul of Japan's letter is appended to this brief.

The brief for the United States as amicus curiae, page 20, acknowledges "some difficulties have developed recently in convincing Germany's Bavarian Central

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[20] *Lando, Executor of the Estate of Leon S. Lando, et al. v. Toyota Motor Corporation, et al.*, No. 85 L 22683, Circuit Court of Cook County, Illinois.

Authority to serve complaints requesting punitive damages."[21] This despite Article 13 which provides in part:

> It [the contracting state] may not refuse to comply solely on the ground that * * * its internal law would not permit the action upon which the application is based. 20 U.S.T. at 364.

To resolve such a "difficulty", Article 14 states it "shall be settled through diplomatic channels." 20 U.S.T. at 364. But how long will that take?

The conclusion is inescapable that a strict adherence to the Convention as advocated by VWAG when an agent such as VWoA exists in this country, would be a perversion of well-established concepts mandating timely notice of litigation so a defendant will not be prejudiced. Indeed, this concept is at the heart of the Convention. A German and Japanese snag is demonstrated which will presumably need resolution "through diplomatic channels."[22] In the meantime, service is not perfected upon the targeted defendant abroad.

It is submitted, the Illinois court's decision is consonant with efficient, effectual service of summons as demonstrated by history and the facts of this case. From the vantage point of Illinois practice, it becomes apparent why respondent chose the course of service that he did. Even though service through the Convention was also available, service on VWoA, was fast, sure and cost efficient.

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[21] See also respondent's Brief in Opposition, p. 8, and Declaration of Kevin R. Culhane, copies of which have been filed with this Court.

[22] VWAG has cavalierly referred to the German refusal as an "anecdote." (Pet. Reply Br. p. 9) It is submitted that anecdote would be a more apt description of that American's trials and tribulations to resolve the matter of refusal to serve the summons "through diplomatic channels."

Conclusion

The judgment of the Appellate Court of Illinois, First District, should be affirmed.

Respectfully submitted,

LEONARD M. RING
Counsel of Record
LEONARD M. RING & ASSOCIATES
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765
Counsel for Amicus Curiae

EUGENE I. PAVALON
Two North LaSalle Street
Suite 1200
Chicago, Illinois 60602
(312) 263-1500
President, Association of Trial Lawyers of America

CONSULATE GENERAL OF JAPAN
OLYMPIA CENTRE, SUITE 1100
737 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60611
PHONE: (312) 280-0400

October 16, 1987

Mr. James E. O'Grady
Sheriff, Cook County
Room 704, Daley Center
Chicago, IL 60602

Re: Case No. 85 L 22 683

Dear Mr. O'Grady:

The documents you submitted to the Ministry of Foreign Affairs regarding the above-mentioned case were returned to our office. The ministry notified us that your suit was failed to comply with the procedure under the Hague Convention.

In order to re-accepted by the Ministry of Foreign Affairs, the following is required:

> The Ministry of Foreign Affairs received the documents from you on September 29, 1987. If your request is accepted by the ministry, it will take at least two months before the result being notified to the ministry (from a district court). Because of taking a time in the process of legal procedure, the date for service on the summons, within 30 days after September 25 the summons were made out, may expire. Therefore, the necessary requirment to be re-submitted to the Ministry of Foreign Affairs is to put off its expiration date.

When the necessary changes have been made, please send the documents to the Ministry of Forein Affairs in Tokyo, Japan.

Sincerely,
/s/ ISAMU YAMADA
Isamu Yamada
Consul of Japan

IY:tm
enclo.

AMICUS CURIAE

BRIEF

No. 86-1052

In The
Supreme Court of the United States
October Term, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,
Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District

MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

WILLIAM H. CRABTREE
EDWARD P. GOOD

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan 48232

JAY M. SMYSER*
405 North Wabash Avenue
Chicago, Illinois 60611
(312) 528-3035

*Counsel of Record

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MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the Motor Vehicle Manufacturers Association of the United

States, Inc. ("MVMA") and the Product Liability Advisory Council, Inc. ("PLAC") respectfully move for leave to file the accompanying brief as *amici curiae*. Petitioner has consented to the filing of this brief; respondent has not.

INTEREST OF MVMA AND PLAC

MVMA is a trade organization whose member companies build over ninety-seven percent of all motor vehicles produced in the United States.* Its members also manufacture other products such as farm, industrial, lawn and garden tractors, agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, turbines, and gasoline and diesel engines for industrial, maritime and agricultural uses.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation**

* MVMA members are Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; M.A.N. Truck & Bus Corporation; Navistar International Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

** PLAC members are American Honda Motor Company, Inc.; American Telephone & Telegraph; Automobile Importers of America, Inc.; Bell Helicopters Textron, Inc.; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; Coleman Company; Eaton Corp.; Fiat Auto USA and Ferrari, N.A.; The Firestone Tire & Rubber Company; Fruehauf Company; Great Dane Trailers, Inc.; International Playtex; Kawasaki Motors Corp.; R. J. R. Nabisco, Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Otis Elevator Co.; Porsche Cars North America, Inc.; Thomas Equipment Co.; Time Manufacturing; Sturm, Ruger & Co.; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.; and U-Haul International, Inc.

whose principal purpose is to submit briefs; as friend of the court, in appellate cases involving significant issues affecting the law of products liability.

MVMA and PLAC members, their parent companies, subsidiaries and affiliates throughout the world have a real and vital interest in the result reached below. That decision, reported at 145 Ill. App. 3d 594, 495 N.E.2d 1114, held it proper to serve a West German corporation under an Illinois statute authorizing service on the alleged domestic agent of a nonresident corporation, making it unnecessary to comply with requirements of the treaty governing service of American judicial process on citizens of West Germany, namely, the Hague Service Convention***.

MVMA and PLAC members and their affiliates have a direct and substantial interest in preserving the integrity and exclusivity of the machinery for service of process in transnational litigation created by the Hague Service Convention.

MVMA and PLAC respectfully suggest that presentation in this case thus far may not have adequately illustrated the extent to which the Illinois decision subverts the purposes of the treaty, engrafting in American law a form of *notification au parquet*, one of the chief evils against which the treaty was designed to protect and creating the risk that Americans sued abroad will be subject to renewed exposure to *notification au parquet*. Starting

*** More formally known as the Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

from the unjustified premise that substituted service in the forum intended eventually to be transmitted to a nonresident alien is complete upon the initial drop in the forum, the Illinois decision sharply limits the operation of the treaty and opens wide a "back door" for serving American judicial process on nonresident aliens. If other adhering nations adopt the Illinois position on the scope of the treaty, the eventual consequence of the Illinois decision will be to strip American citizens sued abroad of important protections against default judgments based on substituted service. Finally, the Illinois decision violates the letter and wisdom of the Supremacy Clause of the United States Constitution (art. VI, cl. 2). Since an American plaintiff already has the power to compel a defendant from another part of the globe to submit to this nation's judicial jurisdiction, the essential question here comes down to whether American courts are justified in depriving nonresident aliens of the protections embodied in the treaty in order to make the mechanics of bringing them to our courts a little easier.

Some of the affiliates of MVMA and PLAC members manufacture products abroad which are sold here; some MVMA and PLAC members are American subsidiaries of foreign manufacturers; some MVMA and PLAC members manufacture goods here which are sold aboard through foreign subsidiaries. Consequently, MVMA and PLAC members and affiliates, being subject to suit on a global scale, are vitally concerned with preserving the integrity and exclusivity of an international system of service of process that is simple, inexpensive and certain.

Respectfully submitted,

December 11, 1987

JAY M. SMYSER
Counsel of Record

405 North Wabash Avenue
Chicago, Illinois 60611
(312) 528-3035

WILLIAM H. CRABTREE
EDWARD P. GOOD

MOTOR VEHICLE
MANUFACTURERS
ASSOCIATION OF THE
UNITED STATES INC. and
THE PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan 48232

Subscribed and sworn to before me
this ___ day of December, 1987.
My Commission expires _____.

_____
Notary Public

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No. 86-1052

In The
Supreme Court of the United States
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a foreign corporation,
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v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,
Respondent.

BRIEF OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

Pursuant to Rule 36 of the Rules of this Court, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and The Product Liability Advisory Council, Inc. ("PLAC") respectfully submit this brief as *amici curiae* in support of the Petitioner.

The *amici curiae* fully endorse the positions urged by the Petitioner in its brief.

INTEREST OF AMICI CURIAE

The interests of the MVMA and PLAC in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amici Curiae*.

———o———

SUMMARY OF ARGUMENT

Even without the treaty, the service in this case violates principles of private international law and the doctrine of comity. It also violates the Hague Service Convention. The Illinois decision subverts the purposes of the treaty, engrafting in American law a form of *notification au parquet*, one of the chief evils against which the treaty was designed to protect, and, simultaneously, the Illinois decision creates the risk that Americans sued abroad will be subject to renewed exposure to *notification au parquet*. Starting from the unjustified premise that substituted service in the forum intended eventually to be transmitted to a nonresident alien is complete upon the initial drop in the forum, the Illinois decision sharply limits the operation of the treaty and opens wide a "back door" for serving American judicial process on nonresident aliens. If other adhering nations adopt the Illinois position on the scope of the treaty, the eventual consequence of the Illinois decision will be to strip American citizens sued abroad of important protections against default judgments based on substituted service. Finally, the Illinois decision violates the letter and wisdom of the Supremacy Clause of the United States Constitution (art. VI, cl. 2). Since an American plaintiff already has the power

to compel a defendant from another part of the globe to submit to this nation's judicial jurisdiction, the essential question here comes down to whether American courts are justified in depriving nonresident aliens of the protections embodied in the treaty in order to make the mechanics of bringing them to our courts a little easier.

———o———

ARGUMENT

I. THE ILLINOIS DECISION INCORRECTLY HOLDS THAT SUBSTITUTED SERVICE IN THIS COUNTRY INTENDED TO BE TRANSMITTED TO A NONRESIDENT ALIEN IS OUTSIDE THE SCOPE OF THE TREATY. THE ILLINOIS DECISION THEREBY DESTROYS FUNDAMENTAL PROTECTIONS EMBODIED IN THE TREATY AGAINST DEFAULT JUDGMENTS BASED ON SUBSTITUTED SERVICE, PROTECTIONS DESIGNED TO SAFEGUARD AMERICANS SUED ABROAD AS WELL AS NONRESIDENT ALIENS SUED HERE.

This Court recently had occasion to express its understanding that the Hague Service Convention provides the exclusive procedures for transnational service of process. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 107 S. Ct. 2542,2551 n. 15 (1987). This case now presents the question whether substituted service in this country of process intended to be transmitted to a nonresident alien is outside the Hague Service Convention.

If it is, the treaty is, in important respects, a dead letter.

If it is not, then the Illinois decision clearly violates the Supremacy Clause of the United States Constitution.

The Illinois Decision.

In *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 594, 495 N.E. 2d 1114 (1986), *leave to appeal denied*, 112 Ill. 2d 595 (1986), the Illinois Appellate Court affirmed denial of a motion to quash purported service of process on Volkswagen Aktiengesellschaft (VWAG), a corporation organized under the laws of and having its principal place of business in the Federal Republic of Germany (West Germany). The purported service was made on an agent of Volkswagen of America (VWOA), which the Illinois court determined to be not only VWAG's subsidiary but also its alleged agent for purposes of service.

Both the United States and the Federal Republic of Germany adhere to the Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (The "Hague Convention" or "Hague Service Convention"), 20 U.S.T. 361, T.I.A.S. No. 6638, reprinted in 28 U.S.C.A. Fed. R. Civ. P. 4 (West Supp. 1986). The Illinois court held that because the substituted service was initially made in the forum, there was "no occasion for service abroad," (145 Ill. App. 3d at 597, 495 N.E.2d at 1116) and the case was therefore outside the scope of that treaty.

What Is NOT at Issue.

Since *International Shoe v. Washington*, 326 U.S. 310 (1946), there has been general acceptance of the greatly expanded power of American courts to summon those beyond their borders to submit to their judicial jurisdiction. That acceptance is a tribute to this Court's assiduous labor to define the limits fairness prescribes to calling people from distant parts of the globe to appear in American courts. See, for example, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Asahi Metal Industries v. Superior*

Court of California, — U.S. —, 107 S. Ct. 1026, 94 L. Ed.2d 92 (1987).

There is no issue here concerning the power of the Illinois court to compel Petitioner to submit to its jurisdiction. The Illinois court acknowledged VWAG does "not contest the legal power of the Illinois courts to consider the claims against it, once process is served in a manner VWAG deems proper." 145 Ill. App. 3d at 600, 495 N.E.2d at 1118. Thus, the sole issue here concerns whether Respondent must follow the procedures required by the Hague Service Convention to summon Petitioner.

The Essential Illinois Holding.

The essential holding of the Illinois Appellate Court and the sole subject addressed here is that the Hague Service Convention does not apply in this case because service was effected in Illinois on an alleged subagent of the German corporate defendant and, therefore, there was "no occasion for service abroad." 145 Ill. App. 3d at 597, 495 N.E.2d at 1116.

Judging the Service Here under Principles of Private International Law and the Doctrine of Comity

Even without the treaty, under general principles of private international law and the doctrine of comity so recently reiterated by this Court (*Societe Nationale of Industrielle Aerospatiale v. United States District Court*, 107 S. Ct. 2542 (1987)) the service in this case would be an invalid basis on which an American court could enter judgment against the Petitioner. The papers served in Illinois were, of course, intended for transmission to the Petitioner's principal place of business in West Germany. Under accepted principles of private international law, the courts of this nation do not have it within their power

to invade the territorial sovereignty of another nation and dictate, contrary to the law of that country, how such process shall be transmitted within West Germany. *See The S.S. Lotus*, P.C.I.J., ser. A, No. 10 (1927), [1927-1928] Ann. Dig. 153 (No. 98), 22 **Am. J. Int'l L.** 8 (1928) and *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980). See also the history of an analogous dispute that arose with Switzerland over just such a problem, Note, 56 **Am. J. Int'l L.** 794 (1962). The conclusion compelled by these principles reinforces the conviction that the service in this case violates the treaty.

The Scope and Purpose of the Hague Service Convention.

"The Hague [Service] Convention 'provides a mechanism by which a plaintiff authorized to serve process under the laws of its country can effect service that will give appropriate notice to the party being sued and will not be objectionable to the country in which that party is served.' *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280,288 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981)." *Mommsen v. Toro*, 108 F.R.D. 444, 445-446 (S.D. Iowa 1985); *Pochop v. Toyota Motor Company, Ltd.*, 111 F.R.D. 464,465 (S.D. Miss. 1986); Siegmund, *Current Developments in Product Liability Affecting International Commerce*, 4 **J. of Products Liability** 109, 119 (1981).

The purpose of the Hague Service Convention, then, is service that not only satisfies the law of this country but that is also nonobjectionable under the law of the country of the nonresident alien to be served. The very reason for being of this treaty involves this dual test of

the sufficiency of process served on nationals of another nation adhering to the treaty.

The Illinois decision carves out a gigantic exception. It holds that the Hague Service Convention has no application when Illinois law approves substituted service in Illinois of process intended eventually to be transmitted to a nonresident alien. This leaves Illinois free, without considering the treaty, to make a unilateral decision on the sufficiency of substituted service in Illinois intended to be transmitted to a nonresident alien. To accept the Illinois decision means that any type of substituted service in the forum, even though it is intended eventually to be transmitted abroad, is outside the scope of the treaty.

A fundamental purpose of the treaty was to minimize the hazards to Americans and other foreigners of that form of substituted service employed in France, The Netherlands and some other countries and called *notification au parquet*. Under this procedure, a non-domiciliary with known address abroad is served in the person of the District Attorney attached to a forum court. Diplomatic channels are then supposed to be used to try to get notice to the defendant abroad, but failure to do this does not invalidate the service.

> French courts have held consistently that such service is valid even if the summons does not reach the defendant, or not in sufficient itme for him to defend. See Dalloz, Repertoire de Procedure Civile et Commerciale, *Voce* "Exploit" Nos. 153-161 (1955); 1964 Mise a Jour, *Voce* "Exploit" No. 159; Rigaux, *La signification des actes judiciaires a l'etranger*, 52 *Revue Critique De Droit International Prive* 447,450 (1963).

Nadelmann, "The United States Joins the Hague Conference on Private International Law," 30 **Law & Cont. Problems** 291, 310, footnote 140 (1965).

For that matter, there are some other countries adhering to the Hague Service Convention that do not recognize any kind of substituted service as we understand it. *See* Brenscheidt, "The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany," 11 **Int. Law** 261,266 (1977).

The draftsmen of the Hague Service Convention sought to minimize the hazards to nonresident aliens from the form of substituted service called *notification au parquet* precisely because such service carried the risk that it could be held effective despite the apparent heedlessness of what happened to the summons after its local delivery. The protection the draftsmen devised is embodied in Articles 15 and 16.

> From the point of view of the Continental countries, the most significant changes are in Articles 15 and 16. These make radical changes in the internal laws of those countries which have heretofore used the system of "*notification au parquet*" to serve process on parties abroad. This system has permitted the plaintiff to serve such process merely by delivery to a local court official. Diplomatic channels are them to be used to try to give notice to the defendant abroad, but failure to do this will not invalidate the service. A default judgment with no notice whatever is easily available in personal actions under this system.
>
> Under the convention, judgment by default against non-resident defendants will be sharply restricted. Normally it cannot be entered unless the plaintiff proves actual service on the defendant, or at his residence, or service by a method normally employed by the state, where the defendant is to be served, in its own domestic actions against its own residents.
>
> Amram, "Report of the Tenth Session of the Hague Conference on Private International Law," 59 **Am. J. of Int'l Law** 87, 90-91 (1965).

What is the scope of the protection embodied in Articles 15 and 16? Although drafted to protect against that form of substituted service called *notification au parquet*, Articles 15 and 16 are not limited to that particular form of substituted service. Articles 15 and 16 both operate "Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service," language essentially like that in Article 1 which defines the entire treaty as operative "where there is occasion to transmit a judicial or extrajudicial document for service abroad."

This Court's decision will determine whether substituted service is within the scope of Article 1 and, coincidentally, Articles 15 and 16. And in that coincidence lies the larger significance of this Court's decision: It will necessarily be understood to apply to *all* forms of substituted service.

We do not believe this Court would pick and choose chauvinistically, holding that forms of substituted service approved under American law are *outside* the treaty's protections, while those forms of substituted service employed in other countries not satisfying our due process criteria and to which Americans might be exposed are *within* the treaty. In other words, in the absence of a rational basis for picking and choosing among possible modes of substituted service as within or without the treaty, the decision

here will be understood to apply to all. In the event this Court holds the substituted service here is outside the scope of the treaty, France, The Netherlands and other countries employing *notification au parquet* might therein find justification for saying that objectionable form of substituted service is also outside the treaty and the protections of Articles 15 and 16 do not apply.

All language is, to an extent, ambiguous. This Court must resolve whatever ambiguities it finds in the language of Article 1 (and, coincidentally, Articles 15 and 16) defining the scope of the treaty's operations and protections. This Court has frequently applied the principle that a treaty must be read in light of its purposes. See, for example, *United States v. Pink*, 315 U.S. 203 (1942). Although we do not believe the language of the treaty defining its scope is ambiguous, should this Court find it so, then we urge the Court to resolve whatever ambiguities it perceives in a manner consistent with this treaty's purposes:

> **It is to be hoped that those countries which ratify this Convention will apply it in the liberal spirit in which it is intended: will apply, in effect, their equivalent of the mischief rule in directing its provisions against the hardship and injustice which it seeks to relieve.**
>
> Graveson, "The Tenth Session of the Hague Conference of Private International Law," 14 **Int. & Comp. L. Q.** 528,539 (1965) (emphasis added).

The principle we espouse was memorably expressed by three of this nation's most distinguished international lawyers at the start of this century:

> We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible.
>
> Opinion of Elihu Root, Henry Cabot Lodge and George Turner, U.S. members of the Alaskan Boundary Tribunal of 1903. S. Doc. No. 162, 58th Cong.,2d Sess., I,53.

For that matter, the Illinois decision turns on an unsatisfactory and inaccurate paraphrase of the treaty's language, concluding that because of the substituted service in Illinois, there is "no occasion for service abroad" (145 Ill. App. 3d at 597, 495 N.E.2d at 1116). The emphasis of the actual language, however, is on the *transmission* of documents overseas. Article 1 speaks of the "occasion to *transmit* a judicial or extrajudicial document for service abroad" (emphasis added). Articles 15 and 16 speak of the occasion where "a writ of summons or an equivalent document had to be *transmitted* abroad for the purpose of service" (emphasis added). This language takes on particular importance when it is recognized that the validity of substituted service in this country depends on the reasonable assurance that the agent initially served will *transmit* the process to the actual, named defendant. Comment *h*, § 36 **Restatement (Second) of Conflict of Laws** (1986 Revisions) (April 15, 1986); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *ABC Drilling Co., Inc. v. Hughes Group*, 609 P.2d 763 (Okla. 1980); *Cf., Sipes v. American Honda Motor Co.*, 608 S.W.2d 125 (Mo. App. 1980) (Failure to provide Secretary of State with corporate defendant's address fatal to purported service).

Similarly, satisfactory substituted service on a corporation requires service on someone who assuredly will *transmit* the papers to the corporate officials responsible for defending it. Friedenthal, Kane & Miller, **Civil Procedure** § 3.20, p. 170 (1985) (emphasis added). "The legislature may provide that any person whose relations and duties to the corporation are such that it may reasonably be supposed that notice and the papers will be *transmitted* to the proper corporate officers for the making of its defense may be served." 9 **Fletcher Cyclopedia Corporations** § 4412, p. 400 (Perm. Ed. 1985) (emphasis added). *Cf., Blackmer v. United States*, 284 U.S. 421, 439 (1932) (service of subpoena on American abroad):

> The efficacy of an attempt to provide constructive service in this country would rest on the presumption that the notice would be given in a manner calculated to reach the witness abroad.

If, therefore, substituted service in this country intended for a nonresident alien contemplates that the papers will be transmitted to the home or principal place of business of the nonresident alien, then certainly such service necessarily involves an "occasion to transmit a judicial or extrajudicial document for service abroad", as distinguished from an "occasion for service abroad." The exact language of the treaty deserves our respect:

> [T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.
>
> *Rocca v. Thompson*, 232 U.S. 317,332 (1912).

Finally, either the substituted service with which we are concerned contemplates that process will be transmitted to the residence or principal place of business of the nonresident alien and is within the scope of the treaty **or** it violates our most fundamental notions of due process.

Under our system of law "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 315 (1950).

> The rule is settled that the ritual of service upon a local official agent does not satisfy the requirements of due process; actual notice must be sent to the nonresident at his or her best known address.
>
> James & Hazard, **Civil Procedure** (3d ed. 1985) § 2.20 p.88.

To sanction the service here as *outside* the treaty, Respondent would have this Court, in effect, give its blessings to a form of *notification au parquet*, substituted service heedless of what happens to the process after its initial delivery. Read as Respondent reads them, the facts of the relationship between VWAG and VWOA might make our concerns about such a decision seem slight. But when the factual permutations to which this decision must apply are considered, these concerns will be understood to be anything but slight.

II. THE ILLINOIS DECISION VIOLATES THE LETTER AND WISDOM OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, ALL TO MAKE IT SLIGHTLY EASIER FOR AMERICAN PLAINTIFFS TO EXERCISE THEIR POWER TO BRING DEFENDANTS HERE FROM OTHER PARTS OF THE GLOBE.

In deciding this case under an issue of State law—whether the facts of the relationship between VWAG and VWOA can sustain a determination that VWOA is the local agent of the nonresident alien—the Illinois decision ignores the supremacy of the treaty under American constitutional law.

The Supremacy Clause is not just a rule without discernible reason that simply must be applied. It embodies a kind of practical wisdom. As the Third Circuit said in considering the Hague Service Convention:

> The nature of the judicial system of the United States, which includes not only the federal courts but also the many state systems with their differing procedural requirements, was one of the primary justifications for entering into a treaty that would provide a uniform, valid method of effecting service. In supporting the statute that authorized the establishment of the Commission on International Rules of Judicial Procedure, Lloyd Wright, then President of the American Bar Association, observed:
>
> > With 49 separate procedural jurisdictions in the United States . . . a unitary approach is the only solution. We can hardly expect [a foreign government] to look favorably on a program of separate negotiation with the representatives of each of the 48 states and with representatives of the Federal Government. The problems must be solved through a single, unified set of discussions, the results of which will be effective for all of the 49 jurisdictions.
>
> Commission on International Rules of Judicial Procedure-Establishment, S. Rep. No. 2392, 85th Cong. 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 5201,5206.
>
> *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

Or, as this Court said in acknowledging Philip C. Jessup's caution, "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

From the point of view of the rest of the world, the solution to the problems of transnational service generated by our federal system is embodied in the Hague Service Convention. To hold that it is exclusive when process must eventually be transmitted to a nonresident national of another adhering country will uphold the purposes of that treaty. On the other hand, affirming the Illinois decision will reintroduce a large measure of the chaos the treaty was designed to eliminate.

From the point of view of basic fairness, there is nothing unjust in asking that an American plaintiff, already empowered to bring a defendant from the other side of the globe into our courts, at least summon the defendant in conformity with his nation's law and in his language. To uphold the Illinois decision might, in some unknown number of cases, effect some slight easing of an American plaintiff's job in bringing a nonresident alien

into our courts, but it would undermine the purposes of the treaty and seem to violate the wisdom in some of this Court's most important teaching in connection with international law:

> [I]n dealing with international commerce, we cannot be unmindful of the necessity of mutual forbearance if retaliations are to be avoided; nor should we forget that any contact we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.
>
> *Lauritzen v. Larsen*, 345 U.S. 571,582 (1953).

CONCLUSION

For the reasons stated above, we respectfully submit that the Illinois decision is wrong, both under principles of private international law and the treaty. It perverts the language of the treaty and in so doing engrafts a form of *notification au parquet* into American law and exposes Americans sued abroad to a renewal of the evils of that form of service. At the same time, the Illinois decision violates the Supremacy Clause of the United States Constitution, all to make it a little bit easier for an American plaintiff to exercise his power to bring a nonresident alien into our court.

Respectfully submitted,

JAY M. SMYSER*

405 North Wabash Avenue
Chicago, Illinois 60611
(312) 528-3035

WILLIAM H. CRABTREE
EDWARD P. GOOD

MOTOR VEHICLE
MAUFACTURERS
ASSOCIATION OF THE
UNITED STATES, INC.
and THE PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
300 New Center Building
Detroit, Michigan 48232

* Counsel of Record

AMICUS CURIAE

BRIEF

No. 86-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates
of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

PETER HEIDENBERGER
1815 H St., N.W., Suite 400
Washington, D.C. 20006
(202) 296-3181

Counsel of Record for
Amicus Curiae
Federal Republic of Germany

December 11, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether state law, authorizing service of process on a United States "involuntary agent" of a defendant residing abroad, permits a state court to circumvent the mandatory Hague Convention for service of judicial documents abroad.

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Brief for the Federal Republic of Germany as Amicus Curiae*

INTEREST OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

The issue before the Court is the applicability of the Convention on The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Mat-

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* Letters expressing consents of all parties to the filing of this Brief are on file with the Clerk of the Court.

ters (hereinafter referred to as "Service Convention").[1]

It was ratified by the United States in 1969 and by the Federal Republic of Germany in 1979.[2] The Federal Republic of Germany considers service of process on a U.S. subsidiary (Volkswagen of America, Inc.) in the United States as "involuntary agent" of its German principal (Volkswagenwerk AG) to be a violation of the Service Convention. It therefore requests the Court to reverse the decision of the Appellate Court of Illinois[3] which upheld such service in violation of the treaty. The Federal Republic of Germany wishes to bring to the attention of the Court that it is joined in its opposition to the circumvention of the Hague Service Convention by the Governments of Great Britain, France, and Japan, as is evidenced by the diplomatic notes filed by said governments in support of the petition for certiorari.[4] The diplomatic note of the Federal Republic of Germany in this case is attached hereto as Appendix A. A second note by the government of France, dated Dec. 7, 1987, is attached as Appendix B.

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[1] Opened for signature November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, (entered into force between the United States and the Federal Republic of Germany on June 26, 1979).

[2] June 26, 1979 BGBl II 779/780.

[3] *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3rd 594, 495 N.E. 2d 1114 (Ill. App., 1.Dist. 1986); Pet. App. 1a-20a.

[4] See Brief for the United States as amicus curiae in *Volkswagenwerk Aktiengesellschaft v. Schlunk* in support of petition for cert., No. 86-1052, at 3a, 5a, 7a.

STATEMENT

The Respondent administrator filed a wrongful death action in the Circuit Court of Cook County, Illinois, alleging that the Volkswagen involved in a head-on collision, killing his parents, was defective. The Respondent administrator initially served Volkswagen of America, Inc. (VWoA), a wholly owned U.S. subsidiary of Volkswagenwerk AG (VWAG) with its principal place of business in Wolfsburg, Federal Republic of Germany. Subsequently, Respondent filed an amended complaint against both VWAG and VWoA. Service on VWAG was not made pursuant to the Service Convention, but by service upon VWoA in the United States. The Appellate Court of Illinois held that this was effective service of process upon the German VWAG under the Illinois Rules of Civil Procedure,[5] which permit that VWoA be treated as an "involuntary agent" for the purpose of service of process.

The Illinois Court concluded that such service of process upon the German VWAG is not in conflict with the Service Convention because service of process was made in the United States and not abroad.

SUMMARY OF ARGUMENT

The decision of the Appellate Court is in violation of the Service Convention. This treaty is mandatory for service on parties residing abroad in signatory countries. To hold that service of process on a domestic subsidiary of a German corporation is valid service upon the German corporation conflicts with the ex-

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[5] Ill. Rev. Stat. 1985 ch. 110 §2-204.

press language of the Convention, its spirit as reflected in its negotiating history, and violates international law. The Convention provides for uniform service abroad and has proven its value and effectiveness.

The well established rule of international law that treaties are to be performed and interpreted in good faith has been disregarded by the Illinois court. The court's strained interpretation that this case does not involve "service abroad" conflicts with the court's holding that the substituted service on an "involuntary agent" in Illinois is effective service of process on a defendant residing abroad. Permitting the individual states to circumvent the Service Convention by applying conflicting domestic law for service of process disregards the judicial system of foreign, sovereign states, conflicts with the Supremacy Clause of the U.S. Constitution, and makes the Convention meaningless.

Contrary to the Illinois court's assertion that foreign parties receive unfair advantage by relying on the Convention, it would be German plaintiffs who would be disadvantaged because German courts would not uphold service on wholly owned subsidiaries of U.S. parent corporations in Germany as valid service upon the U.S. parent corporations. Service upon an "involuntary agent" would not have the desired effect of constituting valid service for purposes of recognition and enforcement of American judgments in Germany, because German courts would not recognize and enforce judgments obtained in violation of the Convention.

ARGUMENT

I. It is undisputed that the Hague Service Convention is the exclusive means to effectuate service of process on foreign defendants in a signatory state and its usefulness has been established.

1. The Government of the Federal Republic of Germany considers the Service Convention to be the exclusive means for service of process upon parties residing in Germany in litigation before courts in the United States. The Court recently expressed in dictum that Article 1 of the Service Convention provides "a model exclusivity provision".[6] The United States in its amicus brief in support of a grant of certiorari in the instant case also reiterated the generally accepted view that the Service Convention is a "mandatory and exclusive" method for service of process abroad.[7] The exclusivity of this Convention, therefore, is not in dispute.

In the decision under review the Appellate Court of Illinois held that under state law agency principles the Convention need not be applied as long as an "involuntary agent" of a defendant residing in a foreign country, upon whom service can be effectuated, can be found in the forum state. This reasoning is untenable in light of the express language of the Convention and its negotiating history.

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[6] *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 107 S.Ct. 2542, 2550-2551 n. 15 (1987). In reviewing the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444), the Court addressed the issue of exclusivity with respect to the two Hague Conventions.

[7] supra n. 4, at 16.

This multilateral treaty provides for a simplified and expeditious system to ensure that a foreign defendant receives timely notice of an action pending against it.[8] In essence, the Convention requires that certain forms be used in connection with such service abroad, that the documents be translated and that they are directed to a foreign government agency designated as central authority.[9] These requirements do not create any substantial burden on litigants.

The negotiating and drafting history of the Convention shows that the drafters intended the Convention to apply, even when the domestic law of the forum permits substituted service. The Official Report of the Drafting Commission foresaw that complications might arise as a result of a conflict between domestic law on service of process and the Convention.[10] When reporting on the negotiating history of Article 1[11] the Rapporteur particularly noted the practice of certain countries which permits the commencement of litigation by serving process on local officials deemed as a matter of law to be agents of the defendant (notification au parquet):

> "... faced with the exact language of the provision one can always raise the question

[8] Service Convention, preamble.

[9] Service Convention, arts. 2, 3 and 5.

[10] Conference de la Haye, V. Taborda Ferreira, Actes et documents de la dixieme session, vol. III Notification (1965) at 367; the negotiating history of the Convention is in the French language.

[11] Service Convention, art. 1: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."

> whether, when a state permits that service on a person residing abroad can be effectuated by remise au parquet, the Convention applies or not. The authentic interpretation by the Commission as it results from the debates is that the Convention applies."[12]

This statement demonstrates that the drafters intended the Convention to apply even where the internal law of a contracting state permits service of process to be made on a foreign defendant by other means.

2. The Federal Republic of Germany sees no apparent reason why Respondent did not follow the simple procedures of the Convention agreed to by the United States. The Solicitor General in his brief supporting certiorari also raised this point and questioned the ultimate wisdom of Respondent's decision to forego use of the Convention. The Solicitor General considers the procedures of the Convention as "proven to be a reliable method for service of process in most cases."[13]

The usefulness of the Convention is evidenced by the growing number of requests for service in Germany received by the German central authorities from courts in the United States:

1979	44
1980	120
1981	255
1982	520

[12] supra n. 10, at 367; the translation is provided by counsel of record.

[13] supra n. 4, at 19.

1983	417
1984	504
1985	638
1986	661[14]

II. The construction of the Hague Service Convention by the Appellate Court of Illinois violates the letter and spirit of this Treaty.

The Appellate Court of Illinois concluded that the Convention does not apply in the instant case because the service of process was not performed outside the United States, stating that "Under Illinois law, if the target for service can be found within the state there is simply no occasion for service abroad."[15]

The fact is that in this case the target for service is the German corporation VWAG and not its subsidiary VWoA.

The Illinois court's holding permits the "involuntary agent" to usurp the sovereign function assigned by the Convention to the central authority, that is, to serve the complaint upon the defendant in Germany. The safeguards provided by the Convention, that the "target for service" shall receive the judicial papers translated in the defendant's language in due time to protect its interests before the court are thereby circumvented.[16]

If service upon an "involuntary agent" in the United States were considered valid service upon a defendant, residing in a signatory state, the door for recognition

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[14] Information supplied by the German Federal Ministry of Justice.

[15] *Schlunk*, 495 N.E. 2d 1114, at 1116; Pet. App. 4a.

[16] Service Convention, art. 5.

of any method for substituted service would be opened, including "notification au parquet", which the drafters had intended to eliminate.

The holding of the Illinois Court also violates the spirit of the Convention, "to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time."[17] To accomplish this, the Convention provides for uniform rules compatible with the widely differing laws governing service of process existing in the signatory states. The benefit of an accepted method for service of process to achieve certainty and simplicity for service of process in transnational litigation is evident.

The Federal Republic of Germany was of the understanding that state law on service of process in transnational litigation had been preempted by the Service Convention, which as federal law supersedes state law. Under the Supremacy Clause of the U.S. Constitution[18] the primacy of federal treaty law should not become the victim of strained and untenable interpretations in order to arrive at the conclusion that a mandatory treaty does not apply.

If service of process upon a domestic "involuntary agent" were to be considered effective service upon a foreign defendant, German parties would be required to accept pleadings in a foreign language. One of the reasons the German Government entered into this Convention was to insure that complaints and other pleadings are served upon German litigants in

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[17] Service Convention, preamble.

[18] U.S. Const. art. VI, §2.

the German language[19] and that a uniform procedure is established for service abroad in litigation before American courts.

The Federal Republic of Germany would never have ratified the Convention if it had anticipated that its intended mandatory character would be circumvented by such strained and parochial misinterpretations as the one offered by the Appellate Court of Illinois.

III. The Illinois court's interpretation of the Hague Service Convention violates the accepted rule of customary international law that treaties must be performed and interpreted in good faith.

The Illinois Court held that the Service Convention does not apply in this case, asserting there is no occasion for service abroad.[20] The Federal Republic of Germany finds this restrictive holding to be a breach of the obligation of the United States under international law to perform and interpret treaties in good faith.

The principle of international law that a treaty is to be interpreted in good faith by giving its terms the usual and contextually required meaning in light of its goals and purposes has been expressed in the Vienna Convention on the Law of Treaties,[21] which the

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[19] Declaration of the Government of the Federal Republic of Germany June 21, 1979; see Martindale-Hubbell, Law Directory (1987) Vol. VIII, Part VII, at 4.

[20] supra n. 15, Pet. App. 4a.

[21] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Int. Legal Materials Vol. VIII No. 4, July 1969, page 679. Art. 26, *"Pacta sunt servanda:* Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Art. 27, *"International law and observance of treaties:* A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . ." Art. 31: *General rule of interpretation* 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

[22] The U.S. Department of State noted that "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L. 92d Cong., 1st Sess. (1977) page 1. United States courts

Federal Republic of Germany has ratified on August 20, 1987. The United States has signed this treaty, but it has not been ratified by the U.S. Senate and is therefore not yet U.S. treaty law.[22] While not hav-

ing the force of treaty law, these principles have been adopted by the Restatement of the Foreign Relations Law of the United States, "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."[23]

Comment (a) to §321 of the Restatement[24] acknowledges that the fundamental doctrine of "pacta sunt servanda" is perhaps the most important principle of international law and that international obligations survive any restrictions in domestic law. These principles of international law explain and give meaning to the pronunciations of the Court concerning treaty interpretation. For example, in *Air France v. Saks*, 470 U.S. 392 (1985), the Court stated that international treaties "are construed more liberally than private agreements". In *Factor v. Laubenheimer*, 290 U.S. 276 (1933), the Court held that if a "treaty fairly admits of two constructions, one restricting the rights, which may be claimed under it, and the other en-

have also treated art. 31 of the Vienna Convention as authoritative; e.g. *Huesserl v. Swiss Air Trans. Co.*, 351 F. Supp. 702, 707 n. 6 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973) (Warsaw Convention); *Day v. Trans World Airlines* 528 F. 2d 31, 33, 36, (2d Cir. 1975) (same application); *Danby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1138 (E.D.N.Y. 1983) (same application). That the Vienna Convention on the Law of Treaties reflects established principles of international law has also been recognized by the European Court for Human Rights which stated in a decision in 1975 that this treaty "enunciates in essence generally accepted principles of international law." Judgment of Feb. 21, 1975, 57 I.L.R. 201, at 213, 214, Golder case.

[23] §321 Tentative final draft July 15, 1985.

[24] Id.

larging it, the more liberal construction is to be preferred."

The Illinois court's reasons for denying the applicability of the Convention are so strained that they cannot be considered to be a good faith interpretation of the treaty.

IV. German courts are precluded in a reverse factual situation from holding that service of process upon a German subsidiary of a foreign parent corporation constitutes valid service upon the parent corporation.

The Appellate Court of Illinois states that foreign nationals would receive greater protection than U.S. citizens by an application of the Convention. However, the court fails to recognize that German plaintiffs are in fact disadvantaged by its rejection of the Convention.

The Convention is designed to facilitate service of process in countries with different legal systems. A brief explanation of the German law governing service of process may therefore be helpful.

German law does not recognize the concept of an "involuntary agent" for service of process as developed by the Illinois court. Service upon an agent is invalid when such agent has not been authorized by its principal or by statute to accept service of process.[25] Since service of process subjects a person to the adjudicatory power of the court it may be initiated and carried out only by the court. Neither the attorney, the plaintiff, nor any other private person, may serve the complaint and summons. Service of

[25] §§173-176, 181-184 ZPO (German Code of Civil Procedure).

process is therefore a judicial and sovereign act. The Federal Republic of Germany accepts the fundamental principle of international law that its sovereignty ends at its borders and that it cannot perform sovereign acts abroad, except pursuant to a treaty or by permission of the foreign sovereign.

The highest German Court for Civil Matters (Bundesgerichtshof) held that service on an "involuntary agent" in Germany is invalid service upon its foreign principal and actual receipt of the complaint by the foreign defendant does not cure otherwise defective service.[26]

In that case the German District Court (Landgericht) in Hamburg had ordered that service of a complaint and summons upon a corporation domiciled in Odessa, U.S.S.R., be effectuated by service on the Trade Office of the Soviet Union in Cologne, Germany, which the plaintiff had named as defendant's "local agent". The Appellate Court (Oberlandesgericht) held that service upon an agent in Germany, not authorized by appointment or by statute for service of process, is not valid service upon a foreign defendant. The highest German court rejected the further holding of the Appellate Court that the defective service had been cured because the foreign defendant had actually received the complaint. The court stated:

> "the formal service of process of a complaint constitutes a sovereign act which gives rise to rights and duties of the party so served; pursuant to general principles of international law such an act cannot be validly effectuated outside the forum state unless this has been permitted by a bilateral or multilateral international agreement."[27]

[26] Judgment of February 24, 1972, Bundesgerichtshof in Zivilsachen (BGHZ), vol. 58 page 177.

The German court reasoned that the receipt of a complaint by a defendant residing abroad is not sufficient to create the legal relationship of plaintiff and defendant because:

> "The judicial system of the foreign country would be disregarded if informal service of process on a party residing there would suffice to create the relation of plaintiff and defendant based on and governed by German law."[28]

Therefore, under German law a defendant's actual receipt of a complaint does not cure defective service in transnational litigation.

While German citizens are required by German law to use the Convention, U.S. citizens could avoid Convention procedures by serving a domestic "involuntary agent", if the reasoning of the Illinois court were adopted. German parties would not be notified of litigation abroad in the German language and would be required to obtain translations, which might not be feasible within the time provided for an answer. The Convention was negotiated to eliminate these problems.

[27] Id. at 179; the translation is provided by counsel of record.

[28] Id. at 180.

V. Judgments of American courts procured by service of process upon "involuntary agents" in contravention of the Hague Service Convention would be denied recognition by German courts.

When a foreign judgment is to be recognized and enforced in the Federal Republic of Germany, the German courts are required to apply § 328 of the Code of Civil Procedure (ZPO), which provides in relevant part:

> "A judgment of a foreign court is not to be recognized: . . .
>
> 2. If the defendant, who has not entered an appearance on the merits, raises the defense that he was not properly served with the initital pleading or has not received it in time to defend himself; . . .
>
> 4. If the recognition of a judgment leads to a result that obviously conflicts with the substantial principles of German law, in particular, if the recognition is incompatible with basic rights."[29]

It is doubtful that a German court, applying this statute, would recognize and enforce a judgment by a court in the United States rendered pursuant to service of process in violation or circumvention of the Service Convention. The German Government urges the Court in interpreting the Convention to take cognizance of the greater certainty the Convention has brought to the enforcement of foreign judgments and to consider the detrimental effects on U.S. plaintiffs

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[29] The translation is supplied by counsel of record.

of serving a domestic "involuntary agent" rather than using the inexpensive and simple Convention procedures.

The United States and the Federal Republic of Germany are parties to two multilateral treaties designed to facilitate mutual judicial assistance, the Evidence Convention and the Service Convention.[30] The Court has rendered a decision on the applicability of the Hague Evidence Convention earlier this year in *Aerospatiale*.[31] It is now faced with ruling on the applicability of the Service Convention. Contrary to the Evidence Convention, which the Court did not recognize as exclusive, the exclusivity of the Service Convention is undisputed. Contrary to the Evidence Convention, the Service Convention does not cause any substantial conflict between the laws of the United States and those of the signatories.[32] Therefore, the simple and uniform procedures provided by the Service Convention should be followed by American courts and the decision below should be overruled.

CONCLUSION

For the reasons stated above the Federal Republic of Germany requests the Court to reverse the decision

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[30] supra n. 1, n. 6.

[31] supra n. 6.

[32] The Evidence Convention dealt with the vital aspect of document discovery and the reservations thereto by other signatories.

of the Appellate Court of Illinois.

Respectfully submitted,

December 11, 1987

PETER HEIDENBERGER
Counsel of Record for the
Federal Republic of Germany
1815 H St., N.W., Suite 400
Washington, D.C. 20006
(202) 296-3181

APPENDIX

APPENDIX A

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to bring to the Department's attention a court decision which is likely to have serious adverse effects on international litigation in civil and commercial matters.

In in re Herwig J. Schlunk as Administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, vs Volkswagen AG, the Appellate Court of Illinois, applying Illinois law, held that plaintiff need not comply with the provisions of the Hague Convention on service abroad of judicial and extrajudicial documents in civil or commercial matters when serving a summons and complaint on the German Volkswagen AG, but that it was sufficient to serve those documents on Volkswagen America, Inc., a subsidiary of Volkwagen AG organized under the laws of New Jersey, which was characterized in the decision as an involuntary agent of Volkswagen AG.

Volkswagen AG has filed a petition for a writ of certiorari challenging the Illinois Appellate Court's decision.

Other courts have recently come to similar conclusions and have put into question an established practice of service under the Convention confirmed by both federal and state courts throughout the years. Therefore, the Federal Republic of Germany attaches great importance to the Illinois Appellate Court's decision being reviewed by the Supreme Court of the United States.

The decision of the Appellate Court of Illinois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character.

Serving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time" and, if the receiving contracting State so requires, in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles. Such a practice rather produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude by provisions of Article 15 and 16 of the Convention.

Furthermore, letting stand the Illinois Court's decision based upon a doubtful involuntary agent rationale, would mean that foreign defendants, whether corporations located in or private persons residing in a contracting State, could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Such a development would eviscerate the Hague Service Convention and throw its signatories back to the confusion existing prior to its ratification.

It would be contrary to the intentions of the framers of the Convention who meant to put an end to that state of confusion by agreeing on mandatory unified procedures of notification and would lead to unproductive and costly litigation for both American plaintiffs and foreign defendants.

The Embassy would very much appreciate it if the Department were to convey the German position to the Supreme Court of the United States and to join in to defend an international convention which has proved to be beneficial to all of its signatory nations.

Washington, D.C., January 22, 1987.

Department of State
Washington, D.C.

APPENDIX B

Ambassade de France aux Etats-Unis
213/DE

Washington, le 7 Décembre 1987

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur d'attirer son attention sur la demande de révision par la Cour Suprême des Etats-Unis, présentée par la Société Volkswagen AG, de son litige avec Herwig J. SCHLUNK, administrateur de biens de Frank J. SCHLUNK et Sylvia SCHLUNK. Cette demande de révision par la Cour Suprême des Etats-Unis fait suite à la notification à l'etranger des actes judiciaires et extra-judiciaires en matière civile ou commerciale ("Hague Service Convention").

La France étant partie à cette Convention, les Autorités francaises considèrent que l'interprétation donnée par la Cour d'Appel de l'Illinois est contraire à la fois à la lettre et à l'esprit de ce traité international.

La Convention de la Haye du 15 Novembre 1965 a pour objet de rendre plus efficace et plus simple la transmission à l'étranger d'actes judiciaires. A cet effet, elle etáblit des procédures précises dont l'une des conditions de fonctionnement est l'uniformité de leur application. Elle est en outre exclusive d'autres moyens de signification de ces actes.

The Department of State
Washington D.C.

En décidant que la loi locale de l'Etat de l'Illinois pourrait l'emporter sur les dispositions de la Convention, et, en l'espèce, permettrait de procèder à la signification d'un acte judiciaire auprès de la filiale américaine d'une société étrangère, le Jugement de la Cour de cet Etat aboutit en pratique à priver d'effet les procédures prévues par la Convention et à lui retirer le caractère d'uniformité pour les parties contractantes qu'ont voulu les auteurs de la Convention et qu'ont ratifié les Etats qui y sont parties.

Si la décision de la Cour de l'Illinois était suivie, chaque Etat aux Etats-Unis pourrait décider de suivre ses propres règles en la matière, et la situation juridique en résultant serait semblable à celle existant avant la Convention de la Haye, entrainant une confusion dans les procédures, des délais dans l'exécution et des frais dommageables aussi bien pour les sociétés américaines qu'étrangères. Outre les arguments de droit qui justifient l'exclusivité de la Convention, il est donc dans l'intérêt des Parties contractantes d'éviter qu'il soit porté atteinte au principe d'uniformité dans son application.

Les autorités francaises qui sont très attachées au respect de la Convention de La Haye, souhaitent que leur position soit prise en considération par la Cour Supréme des Etats-Unis.

L'Ambassade de France, informe le Département d'Etat qu'une copie de cette note verbale est adressée à l'Ambassade de la République Fédérale d'Allemagne./.

L'Ambassade de France saisit l'occasion de la présente note pour renouveler au Département d'Etat les assurances de sa très haute considération.

TRANSLATION

(This translation of the original text in the French language is being provided by the counsel for the amicus curiae and is not an official translation authorized by the French Government.)

Embassy of France
in the
United States — Washington, December 7, 1987

The Embassy of France presents its compliments to the Department of State and has the honor to direct its attention to the request for review by the the Supreme Court of the U.S. which has been made by Volkswagenwerk AG in its litigation with Herwig J. Schlunk, administrator of Frank J. Schlunk and Sylvia Schlunk. This request for review by the U.S. Supreme Court arises from a decision of the Appellate Court of Illinois interpreting the Hague Convention on the the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").

France being a party to this Convention, the French Authorities consider its interpretation by the Appellate Court of Illinois to be contrary both to the letter and to the spirit of this international treaty.

It is the purpose of the Hague Convention of November 15, 1965 to make the transmission of judicial documents to a foreign country more efficient and simpler. To accomplish this it establishes precise procedures whose functioning depends on the uniformity of their application. Moreover, it excludes other means of service of such documents.

The Department of State
Washington, D.C.

The Appellate Court of Illinois decided that the local law of the State of Illinois may override the provisions of the Convention.and, in the instant case it permits the service of a judicial document upon an American subsidiary of a foreign company. The decision of the Court of this State in practice amounts to rendering ineffective the procedures established by the Convention and deprives the Convention of its uniform character for the contracting parties which was intended by the drafters of the Convention and which has been ratified by the signatories.

If the decision of the Illinois were followed, each State of the United States could decide to apply its own rules governing this matter, and the resulting legal situation would be similar to that existing prior to the Hague Convention, leading to procedural confusions, delays in the execution, and costs to the detriment of American as well as foreign companies. Apart from the legal arguments which support the exclusivity of the Convention, it is therefore in the interest of the contracting parties to avoid that the principle of the uniformity of its application be impaired.

The French Authorities attach great importance to the Hague Convention being respected and wish that their position be taken into consideration by the U.S. Supreme Court.

The Embassy of France informs the Department of State that a copy of this note verbale is addressed to the Embassy of the Federal Republic of Germany.

The Embassy of France avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

AMICUS CURIAE

BRIEF

No. 86-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a foreign corporation,

Petitioner,

v.

HERWIG J. SCHLUNK, as Administrator of the Estates of FRANZ J. SCHLUNK and SYLVIA SCHLUNK,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First District

BRIEF OF AMICUS CURIAE ILLINOIS TRIAL LAWYERS ASSOCIATION

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illnois 60602
(312) 726-5015
Counsel of Record
for Amicus Curiae

Of Counsel:
WILLIAM J. HARTE
JOHN B. AUSTIN

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0223

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On Writ of Certiorari to the
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BRIEF OF ILLINOIS TRIAL LAWYERS
ASSOCIATION, AMICUS CURIAE,

INTEREST OF AMICUS CURIAE

The Illinois Trial Lawyers Association ("ITLA") respectfully submits this brief as amicus curiae in support of the Respondent in this case. Copies of letters from both parties consenting to the filing of this brief are being filed with this Court.

ITLA is a voluntary association of approximately 2200 trial lawyers from every district in the State of Illinois. Though some of its members also engage in criminal defense work, ITLA's members primarily represent injured victims of tortious conduct. The decision of this Court will inevitably affect the means by which ITLA attorneys begin the prosecution of claims on behalf of their injured clients.

Illinois consumers are surrounded by products manufactured by foreign nationals who profit from the sales of their products in the United States. ITLA is concerned that petitioner's interpretation of The Convention on The Service Aborad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters ("Hague Service Convention") as mandating service of process upon a foreign corporation by service upon it in

its own country even when that corporation is conducting business in the United States will result in unnecessary delay and prejudice in the prosecution of claims by injured parties. ITLA submits that Petitioner's insupportable reading of the Hague Service Convention would place a substantial burden upon such corporations' products' potential victims and at the very least risk delay in the prosecution of claims in contravention to one of the very purposes of the Convention itself.

ITLA supports the Illinois Appellate court decision as an accurate and thoroughly reasoned affirmance of the validity of the Illinois service of process upon Petitioner in this case, a validity which flows from the inapplicability of the Service Convention provisions (or rather, their

non-mandatory character) when the party served is doing business in Illinois and the service upon it is accomplished in complete compliance with due process requirements.

STATEMENT OF THE CASE

It is undisputed that Volkswagen Aktiengesellschaft ("VWAG") is a corporation organized under the laws of the Federal Republic of Germany ("Federal Republic"); that Volkswagen of America ("VWoA") is a wholly-owned subsidiary of VWAG organized under the laws of New Jersey; that VWoA has its principle place of business in Troy, Michigan; and that it is registered to do business in Illinois. (C 172, 333). Furthermore, it is not in dispute that VWoA received proper notice of the present suit in accordance with the laws of Illinois by

way of proper service of process on C.T. Corporation, its registered agent for that purpose.

Basing its finding on a detailed analysis of the relationship between VWAG and VWoA, the Illinois Appellate court below found that VWAG was doing business in Illinois through its wholly-owned and tightly-controlled subsidiary, VWoA. It thus held VWoA to be an agent of VWAG "by operation of law." The court ruled that since there was no occasion for service abroad in these circumstances, the Hague Convention, by its own terms, did not require compliance with its procedures.

VWAG disputes this ruling. It asserts that VWoA is an "involuntary agent" and that service of process must be made in compliance with the procedures set forth in the Hague Service Convention.

SUMMARY OF THE ARGUMENT

Without desiring unnecessarily to duplicate the discussions of the Plaintiff-Respondent and the Association Of Trial Lawyers Of America ("ATLA"), the Illinois Trial Lawyers Association ("ITLA") respectfully submits to this Court that the arguments of the Petitioner, VWAG and the Federal Republic as amicus curiae are rooted upon a mischaracterization of the ruling of the Illinois Appellate court under present review. It is galling to those of the Illinois bar charged with the responsibility to vindicate the rights of parties injured by persons and corporations doing business in Illinois that VWAG's and the Federal Republic's misconception enables them, in the name of West Germany's offended sovereignty, to propose a solution which

would violate the sovereignty of any State,in this case Illinois - in which VWAG chose to be present for the purpose of its own profit.

The lack of a mandatory application to this case of the Hague Service Convention is clear. But even if there were a shred of support for VWAG's interpretation of the treaty, the reluctance of any signatory nation to barter away any essential powers of its courts may be presumed. This given reality is embodied in the principle that, when construction is necessary, treaties will be interpreted so as to preserve the vitality of State laws. We submit that, were it necessary to resort to construction in the present case, this principle would require affirmance of the Illinois Appellate Court below in any case. Indeed, we submit

that there is nothing in this case which encroaches upon foreign policy in the first place.

I.

VWAG'S AND THE FEDERAL REPUBLIC'S PERSISTENT DUBBING OF VOLKSWAGEN OF AMERICA AS AN "INVOLUNTARY AGENT" MISTATES THE REASONING AND RULING OF THE ILLINOIS APPELLATE COURT AND SEEKS TO MASK VWAG'S TRUE RELATIONSHIP TO ILLINOIS AND ITS COURTS. VWAG'S AND THE FEDERAL REPUBLIC"S FERVENT RELIANCE UPON THIS MISCHARACTERIZATION IN REALITY BETRAYS THEIR ACKNOWLEDGEMENT OF THE PLAIN MEANING OF THE HAGUE SERVICE CONVENTION.

The term "involuntary agent" is an invention of VWAG and the Federal Republic; it nowhere appears in the Illinois decision under scrutiny here. (See Schlunk v. Volkswagenwerk Aktiengesellschaft, 145 Ill.App.3d 594, 503 N.E.2d 1045 (Ill. App. 1986). The method behind the coinage of

this term is clear. It is undisputed that a principal irritant motivating the provisions of the Hague Service convention were the difficulties wrought by the practice of notification au parquet. See VWAG Br., ppp. 43-44; Federal Republic Br., pp. 8-9; Brief for the United States as Amicus Curiae ("United States"), n. 30, pp. 18-19). It is true that notice au parquet does render service upon a local court official valid service upon a non-resident defendant even when that defendant never receives actual notice of the action. (See S. Exec, Rep. 6, 90th Cong., 1st Sess. (1967). Appendix, pp. 11-12). But notification au parquet is objectionable because it is a substitute for service upon the defendant himself which can be accomplished in the forum state despite defendant's total absence from that state

and despite the lack of the notice otherwise required by due process. The opinion of the Illinois Appellate court demonstrates that this case has nothing to do with the evils of notification au parquet. VWAG's and the Federal Republic's spurious invocation of these evils in the term "involuntary agent' is but a desparate attempt to avoid the clear meaning of the Hague Service Convention.

In reality, there is nothing about VWoA's "agency" which is involuntary except VWAG's acceptance of its own submission to the personal service of process of a court in a state where VWAG itself conducts business. While much of the Appellate Court's discussion is indeed framed in terms of the adequacy of VWoA's agency for the purpose of service upon VWAG, the court's

reasoning and the authority it relies upon demonstrate that the court's ruling of proper service upon VWAG is based on its detailed determination that VWAG itself was doing business in Illinois, albeit through its wholly-owned and tightly-controlled subsidiary, VWoA.

The court makes clear its focus on "doing business" not only as a prerequisite in itself for the exercise of personal jurisdiction but as the mode of inquiry in the determination of the validity of service of process upon a parent by means of service on a subsidiary:

> ...There are two prerequisites for an Illinois court to exercise personal jurisdiction over a defendant. It is necessary (1) that the defendant has conducted sufficient activity within the state to have submitted to the jurisdiction of our courts and (2) that the defendant has been served

with process in accordance with the formal requirements of Illinois law. "Doing business" is primarily a test of submitting to Illinois jurisdiction in the first sense. Although the two aspects of personal jurisdiction are distinct, many previous Illinois decisions on the validity of serving a parent corporation through its subsidiary have focused on whether the parent was "doing business" in this state. The answer to this question usually depends upon the relationship between parent and subsidiary. For example, plaintiff places great reliance on Maunder v. DeHavilland Aircraft of Canada (1984), 102 Ill.2d 342, 80 Ill.Dec. 765, 466 N.E.2d 217, cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.E.2d 401. In that case, two plaintiffs brought suit in Illinois against the Canadian manufacturer of an airplane that had crashed in Zambia. The manufacturer was DeHavilland Aircraft of Canada, Ltd. (hereinafter, Ltd.), of Downsview, Ontario. Its wholly owned subsidiary, DeHavilland Canada, Inc. (Inc.), was a Delaware corporation with its principal place of business in Rosemont, Illinois. Ltd. was not licensed to do business in Illinois and had not appointed an agent for service

of process. Plaintiffs served Ltd. by leaving copies of the complaint and summons with an employee of Inc. in its Rosemont office. Our supreme court concluded that Ltd. was doing business in Illinois through Inc. The court then added:

> "Ltd.'s contention that service of process on Inc. was not effective is without merit. We believe that Inc. was an agent of Ltd. for service of process, and that Ltd. was fully apprised of the pendency of the suit by the delivery of a copy of the complaints and summons at Inc.'s office in Rosemont. Davis v. Dresback (1876), 81 Ill. 393.
>
> * * * * * * * * * * *
>
> Since we have determined that Ltd. was doing business in Illinois, we need not address the alternative theory of whether Inc. was the alter ego of Ltd." 102 Ill.2d 342, 353-54, 80 Ill.Dec. 765, 771, 466 N.E.2d 217, 223.

Schlunk v. Volkswagen Aktiengesellschaft, 145 Ill.App.3d 594, 601, 503 N.E.2d 1045 1049-50 (Ill.App. 1986). And see the court's discussion of Braband v. Beech Aircraft (1978), (72 Ill.2d 548, 382 N.E.2d

252, cert denied (1979), 442 U.S. 928) at 145 Ill.App.3d pp. 604-606, 503 N.E.2d, pp. 1051-52.

In light of the Illinois Appellate court's carefully considered finding that VWAG itself was doing business in Illinois, the Federal Republic's claim of its courts' forbearance in parallel situations is particularly inappropriate. (See Brief of Federal Republic, pp. 13-15). It is plain that the "involuntary agent" in the decision of the Bundesgerichtshof in Zivilsachen there discussed had no real business identity or connection with the absent Soviet corporation. Indeed, the Trade Office served seemed not to have had under German law even the duty of forwarding service that notice au parquet would have required of the designated German official. Under these circumstances, of course the

Hague Service Convention applied.

In seeking by such sleight of hand to equate the service of process in the instant case with examples of the ills the Service Convention was designed to prevent, VWAG and the Federal Republic indirectly honor the clarity of the Convention and the inescapable conclusion that its provisions cannot be mandatory in this case.

Their fiction of the "involuntary agent" allows both VWAG and the Federal Republic to feign offended sovereignty in their attempt to relieve VWAG from the responsibilities any corporation assumes when it is present doing business in a foreign jurisdiction. Interestingly, both VWAG and the Federal Republic couch their claims of violated sovereignty in discussions of the Federal Republic's

internal laws regarding valid service of process. (See VWAG Br., pp. 27-30, 47-48; Br. of the Federal Republic, pp. 13-15). By definition, of course, these arguments lead one to the contemplation of a similar sovereignty in the state of Illinois and the relationship between that sovereignty and the treaty here at issue. ITLA submits that under accepted principles of treaty interpretation, even if there were a shred of ambiguity regarding the Service Convention's application to Respondent's service of process on VWAG, such an ambiguity would have to be resolved against the interpretation urged by VWAG and the Federal Republic.

II.

EVEN IF THEY EXISTED, ANY AMBIGUITIES IN THIS TREATY WOULD HAVE TO BE RESOLVED IN FAVOR OF ILLINOIS' POWER

TO PRESCRIBE THE METHOD OF SERVICE OF PROCESS UPON PERSONS DOING BUSINESS IN ILLINOIS.

As the Illinois Appellate court below held, a plain-meaning reading of the Hague Service Convention demonstrates that following its procedures is mandatory only when service abroad is desired upon a defendant who is absent from the forum State. Schlunk v. Volkwagen Aktiengesellschaft, 145 Ill.App.3d 594, 597, 503 N.E.2d 1045, 1046-48 (Ill.App. 1986). But even if the emptiness of VWAG's and the Federal Republic's claim that the Service Convention can be interpreted to require mandatory compliance with its provisions in this case were not so complete, such an interpretation would be foreclosed in any case. For VWAG's and the Federal Republic's claim would create a conflict between

Illinois law and the Service Convention; and in such a case, a State's law must be honored whenever a reasonable interpretation of the treaty in question so permits.

The desire for all possible deference to a State's law is inherent in the federal system and the social contract by which the States ratified the Constitution. Thus, it is axiomatic that this deference can only be nullified by the conflicting exercise of a legitimate power vested in the federal govenment. See Kansas v. Colorado, 206 U.S. 46, 90-91 (1906). Consequently, though the treaty power of the United States is admittedly broad, it too must yield when possible to the states' exercise of their law making powers:

> ...Even the language of a treaty wherever reasonably possible will be construed so as not to override

> state laws or to impair rights arising under them. United States v. Arredondo, 6 Pet. 691, 748; Haver v. Yaker, 9 Wall. 32, 34; Dooley v. United States, 182 U.S. 222, 230; Nielsen v. Johnson, 279 U.S. 47, 52; Todok v. Union State Bank, 281 U.S. 449, 454.

Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938).

That the Hague Service Convention reasonably can be construed so as not to invade Illinois' exercise of its jurisdiction is clear. Thus, even were there an ambiguity in the Convention's language, it would have to be interpreted to affirm the ruling of the Illinois Appellate court below. But we would go further and submit that VWAG's submission to Illinois law removes it altogether from the federal government's foreign policy concern.

We acknowledge that a State's exercise of its power over a matter generally within

its purview must bow to a legitimate exercise of the treaty power (Zschernig v. Miller, 389 U.S. 429, 440 (1968)), and that "the treaty power of the United States extends to all proper subjects of negotiations between our government and the governments of other nations." Geofroy v. Riggs, 13 U.S. 258, 266 (1890). But we submit that the facts and underlying rationale of the cases closest to the present demonstrate that there is here no such "proper subject of negotiations."

While they acknowledged the states' general right to regulate the matter, Hauenstein v. Lynham, 100 U.S. 483 (1879), Geofroy v. Riggs, supra, and Zschernig v. Miller, 389 U.S. 429 (1968) each held state law limiting the right of foreign nationals to take property by intestacy to be an

invalid encroachment upon either a treaty or the federal govenment's effective exercise of foreign policy. But the state laws in Hauenstein, Geofroy and Zschernig treated the foreign nationals in those cases differently from citizens of the United States on the basis of their alienage (and in the case of Zschernig, on the basis of the state courts' assessment of the character of the alien's government). In those cases, there was no specific or even general invocation by the aliens of the states' protection. There was in those cases no act of submission to the states' jurisdiction or any benefit flowing to the foreign nationals by virtue of any acquiescence in the application to them of the states' laws. Indeed, even had those aliens been within the states' borders,

there could have been no correlation between the benefits obtained from the states-civil protection, or even the legal protections afforded those engaged in commerce - and the states' exclusionary laws of descent. For in regard to those laws, the aliens had absolutely no choice of acceptance or rejection. It makes perfect sense that in such circumstances the federal government has the right to alleviate such irritants to relations with foreign powers.

By complete contrast, VWAG entered into Illinois specifically to do business, thereby directly invoking the protections of Illinois law and acquiescing in their content. There is, in short, a direct correlation between VWAG's status and activity in Illinois and Illinois' uniform exercise of its process-serving procedures,

process which in the present case more than fulfilled the Constitution's minimal requirements because it was had on VWAG personally. VWAG acknowledges its submission to Illinois law in its acquiescence to the legal power of the Illinois courts to consider the claims against it. (Schlunk v. Volkswagenwerk, 145 Ill.App.3d 594, 600, 503 N.E.2d 1045, 1049 (Ill. App. 1986)). We submit that the suggestion that this submission stops short of the service of process upon VWAG itself is absurd. In the context of the present discussion, VWAG's business status in Illinois and the notice of suit assured and accomplished on it under Illinois law removes it altogether from the sphere of foreign relations.

CONCLUSION

The Illinois Trial Lawyers Association wishes to add its voice in support of the decision of the Illinois Appellate court decision below. The Hague Service Convention was neither drafted nor ratified to do violence to a forum state's personal jurisdiction over people and corporations who are present, doing business, within its borders and who invoke the protection of its laws.

Respectfully submitted,

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015

Attorney of Record for the
Illinois Trial Lawyers
Association

Of Counsel:
William J. Harte
John B. Austin